Supreme Court, U.S.
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Supreme Court of the United States

JUSTIN JONES, Director,
Oklahoma Department of Corrections,

Petitioner,

v.

MICHAEL JOE WILLIAMS,

Respondent.

On Petition For Writ Of Certiorari
To The Tenth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent was convicted of first-degree murder following a fair trial and received a sentence of life without the possibility of parole. The Oklahoma Court of Criminal Appeals held, however, that his Sixth Amendment right to counsel was violated because his counsel improperly rejected a pre-trial plea offer for a 10-year sentence in exchange for a guilty plea to second-degree murder. To remedy that Sixth Amendment violation, the Oklahoma Court modified his sentence to life *with* the possibility of parole – the lowest sentence for first-degree murder under Oklahoma law. The Tenth Circuit granted habeas relief on the ground that that remedy was constitutionally inadequate. The question presented is:

Did the Tenth Circuit contravene the limits Congress imposed in 28 U.S.C. § 2254(d)(1) when it granted habeas relief on the ground that the remedy the Oklahoma Court of Criminal Appeals gave was constitutionally inadequate, even though this Court has not clearly established what remedy, if any, is appropriate for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Justin Jones, Director of the Oklahoma Department of Corrections, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Tenth Circuit (Pet. App. 1-55), appears in the Federal Reporter as *Williams v. Jones*, 571 F.3d 1086 (10th Cir. 2009), and the opinion denying rehearing and rehearing *en banc* (Pet. App. 122-138) appears in the Federal Reporter as *Williams v. Jones*, 583 F.3d 1254 (10th Cir. 2009). The judgment and order of the District Court (Pet. App. 87-89) and the magistrate's report and recommendation (Pet. App. 57-86) are unreported. The decision of the Oklahoma Court of Criminal Appeals (Pet. App. 90-121) is unreported.

JURISDICTION

The Tenth Circuit entered its *per curiam* opinion on July 14, 2009 (Pet. App. 1-55), reversing the United States District Court for the Eastern District of Oklahoma's denial of federal habeas corpus relief. The Tenth Circuit entered its opinion denying the petition for rehearing and rehearing *en banc* on October 14, 2009. (Pet. App. 122-138). On January 5,

2010, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including February 11, 2010. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, U.S. CONST. art. VI, provides in relevant part:

> In all prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2254), provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in State court proceedings.

STATEMENT OF THE CASE

A. The Facts of the Murder

The facts at trial revealed that in 1997, Respondent entered the home of Larry and Dolores Durrett with a gun. The gunman shot Mr. Durrett three times in his sleep, and twice more when the victim tried to pursue him. Mr. Durrett later died of his wounds. During a routine traffic stop the next day, police discovered Respondent and his girlfriend, Debra Smith, with packed suitcases and a rifle matching the shell casings left at the Durrett's home. At trial, several witnesses reported hearing Respondent threaten to kill Mr. Durrett over a botched drug deal. Evidence also revealed that Respondent's friend and eventual co-defendant, Stacy Pearce, drove Respondent to the Durrett's home the day of the murder and watched Respondent exit the car with a gun in hand. Mr. Pearce testified that when Respondent returned to the car he confessed to shooting Mr. Durrett. Ms. Smith also testified that Respondent confessed to her that he killed Mr. Durrett. (Pet. App. 129 n.2).

B. State Court Proceedings

Respondent was tried in state District Court before a jury, which found him guilty of first-degree murder and sentenced him to life without the possibility of parole. He appealed to the Oklahoma Court of Criminal Appeals, which rejected his various challenges to the underlying murder conviction. (Pet. App. 90-121). The Court, however, remanded to the District Court for an evidentiary hearing on the Respondent's contention that his counsel's performance during the pre-trial plea bargain was deficient. (Pet. App. 106).

The evidentiary hearing revealed that prior to his trial for first-degree murder, an assistant district attorney offered Respondent a 10-year sentence in exchange for a guilty plea to second-degree murder. Respondent wanted to accept the offer, but his attorney, believing that his client was innocent and that acceptance of the plea would amount to perjury, threatened to withdraw from the case if the offer was accepted. (Pet. App. 110-113). After that hearing, the trial court found that trial counsel had rendered deficient performance, but that Respondent suffered no prejudice. (Pet. App. 113-114).

The Oklahoma Court of Criminal Appeals agreed that trial counsel's performance was deficient, but reversed with respect to prejudice. (Pet. App. 117-119). The Court stated that "[t]he lost opportunity to pursue that plea offer with his retained counsel leads us to conclude [Respondent] has indeed suffered

prejudice by his trial counsel's action, for we have no way of reinstating that plea offer, even by reversing this case and remanding for a new trial". (Pet. App. 119). As a remedy, the Court modified Respondent's sentence to life imprisonment with the possibility of parole, the lowest punishment for first-degree murder. *See* Okla. Stat. tit. 21, § 701.9 (Pet. App. 119).

C. Federal Court Proceedings

1. Respondent filed a habeas corpus petition with the United States District Court for the Eastern District of Oklahoma. As relevant here, he claimed that the Oklahoma Court of Criminal Appeals imposed an inadequate remedy for the Sixth Amendment violation that occurred pre-trial. The District Court denied relief. With regard to the challenge to the remedy imposed by the Court of Criminal Appeals, the District Court held that "[s]entencing is a matter of state law . . . and petitioner's modified sentence is within the statutory sentencing range for his crime, see Okla. Stat. tit. 21, § 701.9." (Pet. App. 84).

2. The Tenth Circuit granted a certificate of appealability on the issue of "whether the OCCA's modification of Mr. Williams' sentence from life imprisonment without parole to life imprisonment with parole was a constitutionally adequate remedy for the ineffective assistance of counsel Mr. Williams received during plea negotiations." (Pet. App. 3). By a 2-1 vote, the Court of Appeals held (in a *per curiam*

opinion) that the remedy provided by the Oklahoma Court of Criminal Appeals – modifying his sentence to life with the possibility of parole -- was "objectively unreasonable," and that the habeas petition should therefore be granted. (Pet. App. 1-17).

The Court of Appeals first ruled that Respondent's Sixth Amendment rights were violated. "The fact that [Respondent] subsequently received a fair trial (with a much greater sentence) simply does not vitiate the prejudice from the constitutional violation." (Pet. App. 10). Turning to remedy, the Court of Appeals acknowledged "that there are numerous circuit, district, and state court decisions employing various remedies in this context," including decisions holding that no remedy is appropriate because "a subsequent fair trial vitiates any Sixth Amendment violation." (Pet. App. 12-13 (citing *State v. Greuber*, 165 P.3d 1185 (Utah 2007))). The Court nonetheless concluded that "the OCCA was required to adopt the [remedy] that comes closest" to "restor[ing] the parties' original positions," "without being restrained by state law." (Pet. App. 13). In support of that conclusion, the Court relied on *United States v. Morrison*, 449 U.S. 361, 364 (1981), in which this Court held "that remedies should be tailored to the injury." (Pet. App. 13-14). The Court of Appeals remanded to the District Court to "impose a remedy that comes as close to possible to remedying the constitutional violation, and is not limited by state law." (Pet. App. 14). The Court acknowledged, however, that the only remedies that may be available to the Respondent

would be specific performance or a new trial. (Pet. App. 17).

Judge Gorsuch dissented. He explained that the loss of a plea cannot form the prejudice necessary for ineffective assistance of counsel when there is a lawful jury conviction that follows it. He reasoned that the purpose of the right to effective assistance of counsel is to ensure that a defendant receives a reliable and fair trial, and Respondent had such a trial. (Pet. App. 28-29, 35, 47). The loss of the plea did not affect the quality of the adversarial proceeding; thus, counsel's deficiency did not make the outcome of Respondent's trial any less reliable. (Pet. App. 32-39). Nor, Justice Gorsuch explained, was Respondent's loss of the plea unfair to him because a plea bargain is a matter of prosecutorial discretion and not a legal entitlement. (Pet. App. 35, 37-45).

Justice Gorsuch also considered the potential remedies available to courts in this situation and pointed out that each remedy either fails to restore a defendant to his original position or interferes with the prerogatives of the executive branch. He explained that specific performance of the plea bargain would put Respondent in a better position than he was in originally because it would give him a legal entitlement to a plea, which he did not have before. It would also interfere with the right of the executive to alter or withdraw plea offers. (Pet. App. 53-54). And, he added, it would be odd to provide Respondent with a new trial, given that his first fair trial led to a

higher sentence than the one from which he sought habeas relief. (Pet. App. 55).

3. Four judges dissented from the denial of rehearing *en banc* through another opinion by Judge Gorsuch. Judge Gorsuch stated that the two remedies left available on remand, a new trial or specific performance of a foregone plea bargain, represented a significant new federal intrusion into state judicial functions and a revamping of the separation of powers, one that unsurprisingly conflicts with the decisions of a number of other courts. (Pet. App. 130-131). He noted that no decision from this Court has ever held (or even hinted) that a lawyer's bad advice to reject a plea offer gives rise to a violation of the Sixth Amendment, or any other provision of federal law. (Pet. App. 132). He concluded that "there's no authority anywhere suggesting that [Respondent] suffered a Sixth Amendment violation," and that the remedy given by the Oklahoma Court of Criminal Appeals was therefore more generous than federal law required. (Pet. App. 136).

REASONS FOR GRANTING THE PETITION

In the Antiterrorism and Effective Death Penalty Act (AEDPA), Congress placed strict limits on when federal courts can grant habeas relief. In particular, 28 U.S.C. § 2254(d)(1), forbids federal courts from granting habeas relief based on a state court merits decision unless that decision conflicts with "clearly

established Federal law, as determined by the Supreme Court of the United States." This Court has not hesitated to grant certiorari when a federal court fails to comply with that dictate. *See, e.g.*, *Knowles v. Mirayance*, 129 S. Ct. 1411 (2009); *Wright v. Van Patten*, 552 U.S. 120 (2008); *Schriro v. Landrigan*, 550 U.S. 465 (2007); *Rice v. Collins*, 546 U.S. 333 (2006); *Bradshaw v. Richey*, 546 U.S. 74 (2005); *Holland v. Jackson*, 542 U.S. 649 (2004); *Middleton v. McNeil*, 541 U.S. 433 (2004); *Mitchell v. Esparza*, 540 U.S. 12 (2003); *Woodford v. Viciotti*, 537 U.S. 19 (2002); *Early v. Packer*, 537 U.S. 3 (2002); *Bell v. Cone*, 535 U.S. 685 (2002). The Tenth Circuit did precisely that in this case.

1. This Court has not clearly established that a defendant is prejudiced and that the Sixth Amendment is therefore violated when the defendant rejects a plea offer because of deficient assistance of counsel but then is convicted at a fair trial. As Judge Gorsuch's two dissents demonstrate, a powerful argument can be made that a defendant is not prejudiced in that situation, because he ultimately received precisely the process that the Constitution mandates – a fair trial. (Pet. App. 17, 20, 28-29, 133-136). Although most lower courts have held that a defendant can state a Sixth Amendment claim in that situation, several courts have reached the contrary conclusion.[1] Until this Court resolves the question, a

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[1] *See, e.g., State v. Greuber*, 165 P.3d 1185, 1188-91 (Utah 2007); *Bryan v. State of Missouri*, 134 S.W.3d 795, 802-04 (Mo.

(Continued on following page)

state court cannot be said to have violated "clearly established Federal law, as determined by the Supreme Court of the United States" when it declines to provide *any* remedy.

In this case, the Oklahoma Court of Criminal Appeals did provide a remedy to Respondent for his trial counsel's deficient performance in rejecting a pre-trial plea, which was followed by conviction after a fair trial. The Tenth Circuit nonetheless held that the state court's remedy was not only constitutionally inadequate, but that it violated "clearly established Federal law, as determined by [this] Court." It is difficult to see how that is possible. Given that this Court has not clearly established that the Sixth Amendment is even violated in this context, it inexorably follows that this Court has not clearly established what the remedy would be if there were a violation.

Indeed, in *Arave v. Hoffman*, 552 U.S. 1008 (2007), the Court granted certiorari, in part, to address this precise issue. The Court specifically ordered the parties to answer the following question: "What, if any, remedy should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and

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Ct. App. 2004); *Louisiana v. Monroe*, 757 So. 2d 895, 898 (La. Ct. App. 2000).

sentenced pursuant to a fair trial?" *Id.* at 1008.[2] The Court dismissed the case, however, under Rule 46 and never reached the merits. *Arave v. Hoffman*, 552 U.S. 117 (2008). Accordingly, the issue of the appropriate remedy, if any, remains open. This Court did not clearly establish an answer in *Arave* and has not done so in any subsequent case.

2. The Tenth Circuit nonetheless relied on this Court's decision in *United States v. Morrison*, 449 U.S. 361 (1981), for its conclusion that the Oklahoma Court of Criminal Appeals' decision unreasonably applied clearly established law. (Pet. App. 8). In that case, the Court developed a general test for courts to apply when crafting remedies for Sixth Amendment violations that occur at a post-indictment stage: "[R]emedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." 449 U.S. at 364. That very general rule, while helpful in some situations, does not clearly establish the appropriate remedy "for ineffective assistance of counsel during

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[2] The two questions presented in the *Arave* petition itself asked whether the Ninth Circuit erred in finding deficient performance and prejudice on the facts of the case. Petition for Certiorari at *i, ii, Arave*, 552 U.S. 1008 (No. 07-110), 2007 WL 2238120. The question relating to prejudice did not ask whether prejudice may ever be found where the defendant was convicted following a fair trial. Rather, it asked merely whether prejudice was shown in that case, given that the defendant "failed to allege he would have accepted the state's plea offer but for [his counsel's] advice." *Id.* at *ii*.

plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?"

In holding that *Morrison* clearly established the applicable law in the case, the Tenth Circuit committed the exact same mistake as the courts this Court reversed in *Carey v. Musladin*, 549 U.S. 70 (2006), and *Wright v. Van Patten*, 552 U.S. 120 (2008). In *Musladin*, the Ninth Circuit held that a California state court unreasonably applied clearly established law when it rejected a defendant's due process claim based on members of the murder victim's family wearing buttons bearing the victim's photo. 549 U.S. at 73-74. This Court disagreed, holding that the Ninth Circuit erred when it took a line of cases in which this Court addressed government-sponsored courtroom practices (*e.g.*, "compell[ing] the defendant to stand trial in prison clothes,") *id.* at 75, and held that it clearly established the law with respect to spectators' courtroom conduct. Because of "the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here," and because "[n]o holding of this Court required" applying the Court's test for government-sponsored courtroom practices to courtroom spectators' conduct, this Court held that the Ninth Circuit violated AEDPA when it declared that the state court's rejection of Musladin's challenge to the spectators' courtroom conduct "was contrary to clearly established federal law and constituted an unreasonable application of that law." *Id.* at 77.

Likewise, in *Van Patten*, the Seventh Circuit granted habeas relief on the ground that Van Patten's counsel was presumptively ineffective within the meaning of *United States v. Cronic*, 466 U.S. 648 (1984), because he participated in the plea hearing by speaker phone. 552 U.S. at 122. This Court reversed. The Court agreed that *Cronic* established the general rule that "'when . . . the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small[,] a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.'" *Id.* at 124 (quoting *Cronic*, 466 U.S. at 659-60). But, held this Court, "[n]o decision of this Court . . . squarely addresses the issue in this case, . . . or clearly establishes that *Cronic* should replace *Strickland* in this novel factual context." *Id.* at 125. Thus, although *Cronic* established a general rule as to when prejudice will be presumed, that was not enough to constitute "clearly established law" that prejudice will be presumed in a particular context.

So, too, here. *Morrison* established a general rule regarding the appropriate remedy for a Sixth Amendment violation. But it did not clearly establish what remedy is appropriate in this particular category of cases: where counsel provided ineffective assistance during plea bargain negotiations, and the defendant was later convicted and sentenced pursuant to a fair trial. Indeed, this Court would have had no reason to grant certiorari in *Arave* on the question of the appropriate remedy, if any, in that situation had it already clearly established the applicable rule.

3. The divergent remedies the lower courts have imposed in this situation provide further evidence that there is no clearly established law from this Court controlling the lower courts' choice of remedy. Some courts have granted the defendant a new trial. *See, e.g.*, *United States v. Gordon*, 156 F.3d 376, 381-82 (2d Cir. 1998); *People v. Curry*, 687 N.E.2d 877, 890 (Ill. 1997); *State v. Lentowski*, 569 N.W.2d 758, 761-62 (Wis. 1997); *Larson v. State*, 766 P.2d 261, 263 (Nev. 1988); *State v. Taccetta*, 797 A.2d 884, 888 (N.J. Sup. Ct. App. Div. 2002); *Commonwealth v. Copeland*, 554 A.2d 54, 61 (Pa. Super. Ct. 1988); *Ex Parte Wilson*, 724 S.W.2d 72, 74-75 (Tex. Crim. App. 1987); *State v. Simmons*, 309 S.E.2d 493, 498 (N.C. App. 1983).

Other courts have specifically enforced the forgone plea offer. *See, e.g.*, *Hoffman v. Arave*, 455 F.3d 926, 942-43 (9th Cir. 2006); *Satterlee v. Wolfenberger*, 453 F.3d 362, 368-69 (6th Cir. 2006); *Magana v. Hofbauer*, 263 F.3d 542, 553 (6th Cir. 2001) (requiring specific enforcement of the original plea unless the prosecution shows non-vindictive reasons for changing or withdrawing it); *State v. Kraus*, 397 N.W.2d 671, 676 (Iowa 1986) (requiring specific enforcement unless defendant does not accept the plea); *De Jesus Garcia Jiminez v. State*, 114 P.3d 903, 907 (Okla. Crim. App. 2006).

And still other courts have crafted remedies that are hybrids of the new-trial and reinstatement-of-plea approaches or that are entirely different. *See, e.g.*, *Boria v. Keane*, 99 F.3d 492, 498-99 (2d Cir. 1996)

(ordering defendant's sentence to be reduced to the time he had already served and him discharged because that period was more than double what he would have served under the plea offer); *Beckham v. Wainwright*, 639 F.2d 262, 267 n.7 (5th Cir. 1981) (permitting defendant to choose between reinstatement of the original plea or a new trial); *In re Alvernez*, 830 P.2d 747, 760 (Cal. 1992) (permitting prosecutor to choose between resubmission of the original plea within thirty days or a new trial); *Tucker v. Holland*, 327 S.E.2d 388, 396 (W.Va. 1985) (refusing to reinstate the original plea but directing trial court to consider that plea for approval (or rejection)); *Harris v. State*, 437 N.E.2d 44, 45 (Ind. 1982) (permitting defendant to choose between reinstatement of the original plea or a new trial); *Lyles v. State*, 382 N.E.2d 991, 994 (Ind. App. 1978) (directing trial court to consider original plea for approval unless state withdraws plea, in which case defendant gets a new trial); *Commonwealth v. Napper*, 385 A.2d 521, 524 (Pa. Super. 1978) (granting defendant the opportunity to engage in a new plea bargain with the advice of counsel, and if discussion breaks down, a new trial).

Lastly, some courts believe no remedy is appropriate because there is no prejudice in the first place. *See, e.g.*, *State v. Greuber*, 165 P.3d 1185, 1188-91 (Utah 2007); *Bryan v. State of Missouri*, 134 S.W.3d 795, 802-04 (Mo. Ct. App. 2004); *Louisiana v. Monroe*, 757 So. 2d 895, 898 (La. Ct. App. 2000). This Court recognized that this is one of the possible remedial options through the phrasing of its question in *Arave*:

"What, *if any*, remedy should be provided . . . " 552 U.S. 1008 (emphasis added).

In *Musladin*, this Court stated, "Reflecting the lack of guidance from this Court, lower courts have diverged widely in their treatment" of the issue. 549 U.S. at 76. The lower courts' divergent approaches to the appropriate remedy, if any, for deficient performance during plea negotiations that precede a fair trial "[r]eflect[] the lack of guidance from this Court" on this issue as well. Because this Court has not clearly established the appropriate remedy, if any, for deficient performance in this context, habeas relief under § 2254(d)(1) is foreclosed.

4. In addition to being all over the map, the remedies imposed by the lower courts are all problematic, either failing to restore defendants to their original positions or interfering with the prerogatives of the executive branch. As the Utah Supreme Court has held, and Judge Gorsuch observed, the absence of a remedy that both leaves our system of separation of powers intact and puts the habeas petitioner back in the position he would have been in had there been no constitutional violation suggests that there is no constitutional violation to remedy in the first place. *See Greuber*, 165 P.3d at 1190-91; Pet. App. 52. At the very least, it becomes still harder to fault the Oklahoma Court of Criminal Appeals for not adopting one of those remedies.

First, granting the defendant a new trial does not truly remedy his counsel's error because the

prosecution may choose not to re-offer him the original plea. At that point, we are back where we started: the defendant will be tried. Yet the defendant has already been tried, fairly. Requiring a "do over" of a fair trial, to remedy a pre-trial problem that did not affect the trial one whit, is an odd remedy indeed. As Judge Gorsuch noted, "If a fair trial is the right remedy, then in a real sense he's already received it." (Pet. App. 55).

A new trial also presents practical problems as there is no guarantee that the witnesses and evidence available at the first trial will still be available. A defendant who was already convicted at a fair trial might therefore be acquitted for insufficiency of evidence. On the other hand, the defendant may receive a higher sentence at the new trial than he did the first time around. *See* Pet. App. 55; *Greuber*, 165 P.3d at 1190; *Commonwealth v. Mahar*, 809 N.E.2d 989, 1002-03 (Mass. 2004) (Sosman, J., concurring).

By contrast, specifically enforcing the original plea offer places the defendant in a better position than he was in originally because that gives him a legal entitlement to the plea, which he did not have before. Prior to his trial, the defendant only had a *chance* at the plea offer because the prosecution could have altered or withdrawn the plea, and the state trial judge could have rejected it. Thus, specifically enforcing the original plea interferes with the right of the executive branch to alter or withdraw pleas as it sees fit, implicating serious separation of powers

concerns. *See* Pet. App. 54; *Mahar*, 809 N.E.2d at 1001 (Sosman, J., concurring).

Specifically enforcing the plea offer was one of two remedies that the Tenth Circuit had in mind when it remanded this case to the District Court. (Pet. App. 52-53). This remedy would represent an even more extreme imposition on the executive in this case because the prosecution would be forced to offer a plea to a lesser offense than the one the defendant was ultimately convicted of as the result of a fair trial. *See Mahar*, 809 N.E.2d at 1001, 1001 n.18 (Sosman, J., concurring) ("requiring the prosecution to dismiss a valid charge (as is often necessary to make the lower sentence lawful, . . .) runs afoul of the doctrine of separation of powers").

Hybrid remedies that pair a new trial and a requirement that the prosecution re-offer the original plea, but that permit the prosecution subsequently to alter or withdraw the plea offer, suffer from the same infirmities. The mere judicial act of forcing the prosecution to offer the plea again encroaches on the prerogatives of the executive branch. It is also unfair to the state because the state may have made its original offer only to avoid the expense and risk of trial, which ultimately it was not able to do. *See Greuber*, 165 P.3d at 1190; *Mahar*, 809 N.E.2d at 1001-02 (Sosman, J., concurring).

Admittedly, the remedy adopted by the Oklahoma Court of Criminal Appeals is also an imperfect one. Preserving the defendant's conviction but re-sentencing

him to a lower sentence within the lawful range falls short of restoring the defendant to his original pre-trial position. The issue before the Tenth Circuit, however, was not whether the remedy imposed by the Oklahoma Court of Criminal Appeals was perfect or even proper. It was whether that remedy conflicted with "clearly established Federal law, as determined by [this] Court." This Court has not clearly established the appropriate remedy in this situation – as confirmed not only by the divergent approaches taken by the lower courts, but also by the problematic nature of all of those approaches.

It is not clear from this Court's precedents that there even is a constitutional violation to remedy in this case, let alone what the remedy would be in the event there were a violation. In *Van Patten*, this Court reiterated that the term "clearly established federal law" in 28 U.S.C. § 2254(d)(1) is a narrow one and that only decisions that "squarely address[ ]" the issue in a case fit the bill. 552 U.S. at 125. Because there was no such decision that could form the basis for the Tenth Circuit's decision in this case, the Court should grant the petition and consider summarily reversing the Tenth Circuit.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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571 F.3d 1086

United States Court of Appeals,
Tenth Circuit.
Michael Joe WILLIAMS, Petitioner-Appellant,
v.
Justin JONES, Respondent-Appellee.
No. 06-7103.

July 8, 2009.

Barry A. Schwartz, Kamlet Shepherd & Reichert, LLP, Denver, CO, for Petitioner-Appellant.

Diane L. Slayton, Assistant Attorney General, State of Oklahoma, Oklahoma City, OK (W.A. Drew Edmondson, Attorney General of Oklahoma, with her on the briefs), for Respondent-Appellee.

Before KELLY, McCONNELL, and GORSUCH, Circuit Judges.

PER CURIAM.

Petitioner-Appellant Michael Williams appeals from the district court's denial of his habeas corpus petition brought pursuant to 28 U.S.C. § 2254. The only issue before us is whether, having determined that Mr. Williams received ineffective assistance of counsel in rejecting a plea offer, the Oklahoma Court of Criminal Appeals ("OCCA") fashioned a constitutionally permissible remedy. Our jurisdiction arises under 28 U.S.C. § 1291, and we reverse and remand. On remand, the district court should impose a remedy that comes as close as possible to remedying

the constitutional violation, and is not limited by state law.

Background

Prior to trial for first-degree murder, an assistant district attorney offered Mr. Williams a ten-year sentence in exchange for a guilty plea to second-degree murder. Mr. Williams wanted to accept the offer, but his attorney, believing that Mr. Williams was innocent, threatened to withdraw from the case if the offer was accepted. The case proceeded to trial, the jury returned a guilty verdict, and Mr. Williams was sentenced to life imprisonment *without* the possibility of parole.

On direct appeal, the OCCA remanded the case back to the trial court for an evidentiary hearing on whether Mr. Williams's trial counsel rendered ineffective assistance during the plea process. After that hearing, the trial court found that trial counsel had rendered deficient performance but also found that Mr. Williams suffered no prejudice. On review, the OCCA held that Mr. Williams's trial counsel rendered deficient performance and that Mr. Williams was prejudiced thereby because he lost the opportunity to pursue the plea offer with trial counsel. As a remedy, the OCCA modified Mr. Williams's sentence to life imprisonment *with* the possibility of parole, which is the lowest punishment for first-degree murder. *See* Okla. Stat. tit. 21, § 701.9; *see also* Okla. Stat. tit. 22, § 1066.

Mr. Williams unsuccessfully sought habeas relief in federal district court, contending that the remedy for the ineffective assistance of counsel was inadequate. Without acknowledging the federal principle that the remedy must be tailored to the constitutional violation, the federal district court simply held that the modified sentence fell within the statutory sentencing range for first-degree murder in Oklahoma, and thus the modified sentence was inherently constitutional. *Williams v. Jones,* No. CIV-03-201-RAW, 2006 WL 2662795, at *12 (10th Cir. Sept. 14, 2006). It relied upon cases (inapposite) involving Eighth Amendment challenges to lengthy sentences within statutory limits. *Id.* (citing *United States v. O'Driscoll,* 761 F.2d 589, 599 (10th Cir.1985); *Gaines v. Hess,* 662 F.2d 1364, 1370 (10th Cir.1981)).

Discussion

We must decide only whether the remedy imposed for the Sixth Amendment violation identified by the OCCA is constitutionally adequate. We granted a COA only on the remedy issue, and a COA is a jurisdictional prerequisite to a decision on the merits of an appeal. 28 U.S.C. § 2253(c)(1); *Miller-El v. Cockrell,* 537 U.S. 322, 335-36, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). The State does not contest the OCCA's finding of ineffective assistance of counsel in this context. But before resolving the remedy issue, we must consider whether Mr. Williams exhausted his claim.

A. *Exhaustion*

Notwithstanding the State's position throughout these proceedings that available state remedies have been exhausted, we raised the issue of exhaustion sua sponte and received supplemental briefs. Of course, a habeas petition may be denied despite a failure to exhaust. 28 U.S.C. § 2254(b)(2). But it may not be granted unless exhaustion has occurred (or an exception to exhaustion applies). *Id.* § 2254(b)(1)(A). Although a State may waive exhaustion, such a waiver must be express and through counsel. *Id.* § 2254(b)(3).

We need not address whether the State has waived exhaustion or whether exhaustion would be futile, because our review of the record persuades us that Mr. Williams did exhaust by requesting a proper remedy from the OCCA when presenting his ineffective assistance of counsel claim. He relied upon federal caselaw in arguing that specific performance of a plea agreement would be a constitutionally permissible remedy and that his conviction should be reversed, the plea reinstated, or the sentence modified. I R. Doc. 1, Ex. 3 at 7-8. He sought a sentence of ten years.

This theme continued in his federal habeas petition, where he sought reinstatement of the ten-year plea or a new trial based upon ineffective assistance of counsel. I R. Doc. 1, Statement of Facts

in Support of Habeas Corpus at 8[1]; *see also* I R. Doc. 1, Ex. 1 at 3; I R. Doc. 1, Ex. 3 at 7-8. Both in the district court and in its response brief on appeal, the State indicated that Mr. Williams had exhausted his state court remedies as to the grounds raised and argued the merits of the remedy.[2] I R. Doc. 17 at 2, ¶ 5; Aplee. Br. at 4, 13-25. Although the magistrate judge remarked in a footnote that Mr. Williams did not argue that the OCCA's sentence modification denied him his constitutional rights and that such a claim is unexhausted, I R. Doc. 21 at 18 n.2, Mr. Williams was far more specific: he argued that the remedy for ineffective assistance of counsel required a lesser sentence of ten years or a new trial. Were there any doubt, he then objected to the magistrate judge's report and recommendation on the basis "that the remedy employed by the OCCA is inadequate to vindicate the constitutional error." I R. Doc. 26 at 5 (emphasis omitted). Accordingly, Mr. Williams properly exhausted his claims.

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[1] There are two pages numbered "8" and both are referenced.

[2] The State conceded at oral argument that exhaustion would be futile given the OCCA's adherence to state law; the relief sought by Mr. Williams simply goes beyond what state law permitted. *See also* Aplee. Br. at 8 (acknowledging that the OCCA had no authority to sentence below that which was fixed by statute).

B. *Merits*

The federal claims that the OCCA adjudicated on the merits are subject to the familiar statutory deferential standards. Habeas relief may be granted only where the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2). State court findings of fact are presumed correct unless rebutted by the petitioner by clear and convincing evidence. *See id.* § 2254(e)(1). Our review of the district court's legal analysis is de novo. *Douglas v. Workman,* 560 F.3d 1156, 1170 (10th Cir.2009).

At the same time, where the state court applies a different (wrong) legal standard or does not decide the claim, deferential AEDPA standards do not apply and our review is de novo. *Id.* In this case, the district court applied *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to Mr. Williams's ineffective assistance claims insofar as finding deficient performance and prejudice. Thus, the OCCA identified the correct legal standard[3] so our

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[3] *Hill v. Lockhart,* 474 U.S. 52, 56-59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), is the most specific case in the plea context. As the OCCA recognized, a defendant may prevail on an ineffective assistance claim in this context by demonstrating deficient performance and prejudice, viz. a defendant is required

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review would be for an unreasonable application. *See Williams v. Taylor,* 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (an unreasonable application is where the state court applies the correct legal principle in an objectively unreasonable manner). However, in deciding the remedy for the ineffective assistance, the court did not discuss (and may not have been able to apply) the principle that the remedy must be tailored to the injury. *United States v. Morrison,* 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981). Ultimately, the OCCA settled on a remedy that was consistent with state-law sentencing options for first-degree murder and concluded that it was powerless to reinstate the plea offer even with a reversal and new trial.[4]

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to show that counsel's performance fell below an objective level of reasonableness and that, but for counsel's deficient performance, the defendant would have accepted the plea offer and pled guilty. *United States v. Carter,* 130 F.3d 1432, 1442 (10th Cir.1997); *see also Hill,* 474 U.S. at 58-59, 106 S.Ct. 366 (similar test for ineffective assistance of counsel when deficient performance results in acceptance of plea); *United States v. Mathis,* 503 F.3d 150, 152 (D.C.Cir.2007); *Julian v. Bartley,* 495 F.3d 487, 497-500 (7th Cir.2007); *Satterlee v. Wolfenbarger,* 453 F.3d 362, 370 n. 7 (6th Cir.2006); *United States v. Merritt,* 102 Fed.Appx. 303, 307 (4th Cir.2004); *Nunes v. Mueller,* 350 F.3d 1045, 1054-56 (9th Cir.2003); *Wanatee v. Ault,* 259 F.3d 700, 703-04 (8th Cir.2001); *Smith v. Singletary,* 170 F.3d 1051, 1053 (11th Cir.1999); *United States v. Gordon.* 156 F.3d 376, 380-82 (2d Cir.1998); *Teague v. Scott,* 60 F.3d 1167, 1170-71 (5th Cir.1995); *Jiminez v. State,* 144 P.3d 903, 907 (Okla.Crim.App.2006).

[4] It is worth noting that in similar circumstances (ineffective assistance of counsel based upon failure to

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We need not decide whether the remedy selected should be accorded deference as an application of federal law or evaluated de novo because even under a deferential standard of review the remedy was objectively unreasonable. In fashioning the appropriate remedy for ineffective assistance of counsel, the remedy "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Id.* We think it axiomatic that the remedy for a properly presented constitutional violation should not be frustrated by the sentencing options available under state law, but rather should be consistent with federal law. We proceed to consider the nature of the violation, any resulting prejudice, and the other interests involved.

The plea bargaining process is a critical stage of a criminal prosecution. *Nunes v. Mueller,* 350 F.3d 1045, 1053 (9th Cir.2003); *see Iowa v. Tovar,* 541 U.S. 77, 81, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004) (entry of the guilty plea is a critical stage of the criminal process); *Burger v. Kemp,* 483 U.S. 776, 803-04, 107

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communicate a favorable plea offer), the OCCA would later utilize an analytical framework for ineffective assistance similar to what we employ here and modify a sentence to conform to the plea offer. *Jiminez,* 144 P.3d at 907. Of course, the State points out that the offense of conviction was the same contained in the plea offer, a fact that differs in this case. The OCCA also observed that, even if the defendant "stands a fair and impartial trial," he still can be prejudiced by the failure of counsel to convey a plea offer. *Id.*

S.Ct. 3114, 97 L.Ed.2d 638 (1987) (pretrial plea negotiations are a critical stage of the criminal process). Accordingly, the Sixth Amendment applies to representation during the plea process. *Hill v. Lockhart,* 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Jiminez v. State,* 144 P.3d 903, 905 (Okla.Crim.App.2006) ("Although we have no published case declaring this point of law, the right to effective counsel guaranteed by the Sixth and Fourteenth Amendments and Article 2, § 20 of the Oklahoma Constitution protects a criminal defendant from objectively deficient representation by defense counsel in connection with the plea bargaining process.").

Mr. Williams established deficient performance and prejudice. *See Strickland,* 466 U.S. at 687, 104 S.Ct. 2052; *United States v. Carter,* 130 F.3d 1432, 1442 (10th Cir.1997); *Jiminez,* 144 P.3d at 907. The deficient performance was counsel's advice concerning the plea agreement – advising Mr. Williams he would be committing perjury by accepting the plea offer and insisting that Mr. Williams proceed to trial or find new counsel if he wanted to accept it. As the OCCA no doubt recognized, the prejudice Mr. Williams identified was that, had he been adequately counseled, there is a reasonable probability that he would have accepted the plea offer and limited his exposure to ten years. *See Julian v. Bartley,* 495 F.3d 487, 498-99 (7th Cir.2007); *Satterlee v. Wolfenbarger,* 453 F.3d 362, 370 n. 7 (6th Cir.2006); *Nunes,* 350 F.3d at 1054-55; *Wanatee v. Ault,* 259 F.3d 700, 703-04 (8th Cir.2001);

see also Carter, 130 F.3d at 1442; *Jiminez,* 144 P.3d at 907. The fact that Mr. Williams subsequently received a fair trial (with a much greater sentence) simply does not vitiate the prejudice from the constitutional violation. *See Wanatee,* 259 F.3d at 703 (citing *Engelen v. United States,* 68 F.3d 238, 241 (8th Cir.1995) (collecting cases)); *Jiminez,* 144 P.3d at 907 (noting defendant's interest in avoiding trial altogether (citing *State v. Garrison,* 40 S.W.3d 426, 431 (Tenn.2000))).

The State reminds us that plea offers are discretionary and the assistant district attorney was not required to extend one or keep an offer open. This would be a very different case had the assistant district attorney declined to extend an offer or revoked it prior to trial. *See Mabry v. Johnson,* 467 U.S. 504, 507-08, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984), *abrogated on other grounds by Puckett v. United States,* ___ U.S. ___, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009); *Weatherford v. Bursey,* 429 U.S. 545, 561, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). However, the OCCA found that the ineffective assistance occurred when the plea offer was available. The evidence credited by the OCCA suggests a reasonable probability that the plea offer would have been accepted but for defense counsel's ineffective assistance. *See Satterlee,* 453 F.3d at 370 n. 7; *Magana v. Hofbauer,* 263 F.3d 542, 551 (6th Cir.2001); *Jiminez,* 144 P.3d at 907. Accordingly, we are not dealing with the government's discretion to make or withdraw a plea offer. Rather, we are dealing with an

offer that was rejected because of defense counsel's ineffective assistance, with disastrous results for Mr. Williams. In the end, this ineffective assistance and the resulting prejudice is attributable to the State. *See Kimmelman v. Morrison,* 477 U.S. 365, 379, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *Cuyler v. Sullivan,* 446 U.S. 335, 343-45, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

The result in this case is unchanged by the fact that the Supreme Court has commented, in the context of a Sixth Amendment choice of counsel case, *United States v. Gonzalez-Lopez,* 548 U.S. 140, 147, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006), that effective assistance serves the purpose of protecting the right to a fair trial. *Gonzalez-Lopez* recognizes that counsel can be ineffective where "his mistakes have harmed the defense." *Id.* Surely, the plea process is part of the defense. *See Hill,* 474 U.S. at 57, 106 S.Ct. 366. The Court has rejected the idea that "the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt." *Kimmelman,* 477 U.S. at 380, 106 S.Ct. 2574 (ineffective assistance claims may include failure to seek suppression of evidence even though such claims are barred on collateral review). Moreover, effective assistance is guaranteed for the whole plea process, not just in connection with accepting (but not rejecting) a plea agreement.

Much of the State's argument on appeal is that what remedy is afforded by the OCCA is solely a

matter of State law and no due process violation occurs when the OCCA exercises that power. *See* Okla. Stat. tit. 22, § 1066 ("The appellate court may reverse, affirm or modify the judgment or sentence. . . ."); *Clemons v. Mississippi,* 494 U.S. 738, 745, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990); *Carbray v. Champion,* 905 F.2d 314, 317-18 (10th Cir.1990). The short answer to that is that any correction for a federal constitutional violation must be consistent with federal law; Mr. Williams is not seeking habeas relief for errors of State law, but rather for a Sixth Amendment violation. Moreover, *Clemons* and *Carbray* stand for the now unremarkable proposition that a state scheme allowing an appellate court to modify a jury sentence does not constitute a federal constitutional violation; it does not deprive a defendant of a liberty interest in violation of due process. *Clemons,* 494 U.S. at 745-46, 110 S.Ct. 1441; *Carbray,* 905 F.2d at 317-19.

The State acknowledges that there are numerous circuit, district, and state court decisions employing various remedies in this context.[5] Aplee. Br. at 19; *see*

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[5] *See, e.g., Julian,* 495 F.3d at 500 (a court has discretion whether to order a new trial or impose the terms of the original plea offer); *Hoffman v. Arave,* 455 F.3d 926, 942-43 (9th Cir.2006) (proper remedy is reinstatement of plea offer), *vacated in part,* 552 U.S. 117, 128 S.Ct. 749, 169 L.Ed.2d 580 (2008); *Satterlee,* 453 F.3d at 370 n. 7 (defendant should be given an opportunity to accept offer); *see also United States v. Gordon,* 156 F.3d 376, 381-82 (2d Cir.1998) (grant of new trial was an appropriate remedy); *Jiminez,* 144 P.3d at 907 (sentence

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also Aplee. Br. at 24. We decline to adopt an approach based upon *State v. Greuber,* 165 P.3d 1185 (Utah 2007), which would hold that a subsequent fair trial vitiates any Sixth Amendment violation. We note this approach is inconsistent with our case law, *Carter,* 130 F.3d at 1442, and represents an approach rejected by the OCCA not only on federal, but also State, constitutional grounds, *Jiminez,* 144 P.3d at 907.

The State certainly has an efficiency interest in upholding the modified sentence resulting from a fair trial and partially successful appeal. The State will have incurred the costs of prosecution, and Mr. Williams has defended and tested the State's case; yet he now will be able to obtain the benefits of the plea offer. Yet the OCCA recognized the obvious merit of reinstating the plea offer were it possible – it would address the prejudice Mr. Williams suffered. *See Satterlee,* 453 F.3d at 370 n. 7; *United States v. Blaylock,* 20 F.3d 1458, 1468 (9th Cir.1994). In the end, no remedy may restore completely the parties' original positions. Still, the OCCA was required to adopt the one that comes closest, without being constrained by state law. *See Morrison,* 449 U.S. at 365, 101 S.Ct. 665 ("Our approach has thus been to identify and then neutralize the taint by tailoring

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modified to conform to term in plea agreement). Our circuit has considered a claim for specific performance of a plea agreement, but rejected it based on an inadequate showing of deficient performance and prejudice. *Carter,* 130 F.3d at 1442.

relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial."). We also note that such an approach is consistent with Oklahoma case law suggesting that the balance should be struck in favor of providing an effective remedy where a defendant has been deprived of a plea agreement due to ineffective assistance. *Jiminez*, 144 P.3d at 907.

Recognizing the discretion to resolve this issue "as law and justice require," 28 U.S.C. § 2243, we will remand the case with instructions to the district court to entertain briefing and impose a remedy that comes as close as possible to remedying the constitutional violation, and is not limited by state law. The district court has the power to grant the writ conditionally to allow the State to comply. *See Nunes*, 350 F.3d at 1056-57.

We have carefully considered Judge Gorsuch's dissent. There is some common ground – the panel is unanimous that (1) Mr. Williams's right to counsel attached at the time of plea negotiations, (2) he had a right to effective representation during those negotiations, (3) his counsel rendered deficient performance, and (4) the OCCA's remedy is insufficient for the federal constitutional violation it found.[6] We reject the conclusion expressed in the dissent that Mr. Williams cannot demonstrate

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[6] Of course, the dissent contends that there is no constitutional violation hence any remedy was unnecessary.

prejudice because he received a fair trial subsequent to plea negotiations and was not entitled to a plea offer.

According to the dissent, no remedy exists because no defendant can ever prove prejudice in rejecting a plea given a subsequent fair trial. No federal circuit case so holds. Although the dissent relies upon *United States v. Springs,* 988 F.2d 746, 749 (7th Cir.1993), the Seventh Circuit follows the same rule we do: a defendant in these circumstances may be entitled to a remedy if he can prove deficient performance and prejudice, i.e., "that but for his lawyer's advice, he would have taken the plea offer." *Julian,* 495 F.3d at 497; *see Carter,* 130 F.3d at 1442; *supra* n. 3 (identifying ten circuits). This rule is derived from *Strickland* and *Hill,* which provide a similar test when a defendant claims his acceptance of a plea offer was the product of ineffective assistance of counsel. In those circumstances, a defendant must prove deficient performance in connection with the plea process, and but for the deficient performance, he would have gone to trial. *Hill,* 474 U.S. at 58-59, 106 S.Ct. 366; *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052.

To the extent that the dissent's conclusion results from a view that the Sixth Amendment pertains only to trial rights in connection with guilt or innocence, this is a view rejected by the Supreme Court and incompatible with a right to effective assistance of counsel in connection with the entire plea process. *Kimmelman,* 477 U.S. at 380, 106 S.Ct. 2574; *Hill,*

474 U.S. at 57, 106 S.Ct. 366. Such an approach also conflicts with the Supreme Court's rejection of superimposing another requirement on the prejudice inquiry, i.e., the fairness or reliability of the trial process. *Williams,* 529 U.S. at 394-95, 120 S.Ct. 1495; *Short v. Sirmons,* 472 F.3d 1177, 1196 (10th Cir.2006). To the extent the dissent's conclusion results from Mr, Williams's lack of entitlement to a plea offer, we believe the matter more nuanced – Mr. Williams was entitled to the effective assistance of counsel during plea negotiations, including the decision whether to accept or reject the plea offer. *See Nunes,* 350 F.3d at 1052-53. He was thereby prejudiced because had he been adequately counseled, there is a reasonable probability that he would have accepted the plea offer and limited his exposure to ten years.

No one contests the rule that plea offers are executory in nature and that, under *Mabry* and *Weatherford,* a prosecutor may, consistent with due process, decline to offer or withdraw an offer. But here, the assistant district attorney made an offer that Mr. Williams had a right to accept, as long as it was open, with effective assistance of counsel. *See Hill,* 474 U.S. at 56, 106 S.Ct. 366 (noting that the voluntariness of any plea depends upon effective assistance of counsel); *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052 (part of counsel's duty is to assist the defendant and consult with him on important decisions); *Bordenkircher v. Hayes,* 434 U.S. 357, 362, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978) (discussing the importance of counsel during plea negotiations).

Likewise, this is not a situation where Mr. Williams is claiming ineffective assistance of counsel based upon something to which he had no right, i.e., an objection by counsel based upon an erroneous interpretation of the law. *See Lockhart v. Fretwell,* 506 U.S. 364, 372-73, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). Though the dissent may well be right that the options in this case are limited to specific performance or a new trial, in an abundance of caution we would prefer the parties explore any alternatives under a backdrop of the applicable law. Thereafter, the district court may exercise its discretion.

REVERSED and REMANDED.

GORSUCH, Circuit Judge, dissenting.

The Sixth Amendment right to effective assistance of counsel is an instrumental right designed to ensure a fair trial. By his own admission, Michael Williams received just such a trial, at the end of which he was convicted of first degree murder by a jury of his peers. We have no authority to disturb this outcome. The majority says that counsel's deficient performance in the plea bargain process denied Mr. Williams a lesser second degree murder conviction, and that this justifies voiding the result of Mr. Williams's fair trial. But the due process clauses of the Constitution's Fifth and Fourteenth Amendments do not encompass a right to receive or accept plea offers. As the Supreme Court has repeatedly held,

plea bargains are matters of executive discretion, not judicially enforceable entitlement; due process guarantees a fair trial, not a good bargain.

Without challenging any of this, the majority nonetheless recognizes a constitutional right to accept a plea offer grounded in the Sixth Amendment's guarantee of effective assistance of counsel, creating indirectly what the Supreme Court's precedents preclude it from recognizing directly as a matter of due process under the Fifth and Fourteenth Amendments. The practical upshot? So long as a defendant can claim his lawyer mishandled a plea offer, he can take his chances at a fair trial and, if dissatisfied with the result, still demand and receive the benefit of the forgone plea. The majority's holding has already been rejected by a number of other courts and been the subject of a grant of *certiorari* (later dismissed when the parties mooted the question). *See Hoffman v. Arave,* 455 F.3d 926, 942-43 (9th Cir.2006), *cert. granted,* ___ U.S. ___, 128 S.Ct. 532, 532-33, 169 L.Ed.2d 371 (2007), *vacated as moot,* 552 U.S. 117, 128 S.Ct. 749, 169 L.Ed.2d 580 (2008). Respectfully, I dissent.

I

The OCCA held that counsel's failure to encourage or allow Mr. Williams to accept the plea bargain violated his Sixth Amendment right to effective representation. But, by way of remedy, the OCCA afforded Mr. Williams only a reduced

sentence-life with, rather than without, the possibility of parole. Mr. Williams contends this remedy failed to redress fully the constitutional violation. The Sixth Amendment, he submits, requires us to return his case to the Oklahoma courts with directions either to release him or afford him the ten-year sentence the prosecution originally offered. We granted a certificate of appealability to address this question.

Of course, the adequacy of the OCCA's chosen remedy under the Sixth Amendment cannot be evaluated without first determining the scope, if any, of the constitutional violation. Remedies, after all, exist to vindicate rights. If no Sixth Amendment violation took place, there need be, can be, no further remedy: "Absent [some prejudicial] impact on the criminal proceeding . . . there is no basis for imposing a remedy." *United States v. Morrison,* 449 U.S. 361, 365, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981). That is, if no Sixth Amendment violation took place, we must reject Mr. Williams's demand for greater relief than the OCCA provided because, as it happens, even that much wasn't constitutionally compelled. We would, thus, deny Mr. Williams's request for further relief, if for different grounds than those the OCCA offered.[1]

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[1] While the Antiterrorism and Effective Death Penalty Act of 1996 prohibits us, in certain circumstances, from *issuing* a habeas writ unless the state court's ruling was unreasonably wrong; it does nothing to disturb the usual rule that we may affirm a state court's denial of a writ for any reason supported by the record. *See* 28 U.S.C. § 2254(a) & (d).

At the same time, if we do find a constitutional violation has occurred, ascertaining the nature and scope of that violation remains a critical and unavoidable task because any remedy must be "tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Id.* at 364, 101 S.Ct. 665.

So, first things first, what exactly is the right allegedly violated here? Mr. Williams argues that he was entitled by the Sixth Amendment to effective representation by counsel during his plea negotiations with the prosecution; that his lawyer provided grossly deficient performance when he threatened to withdraw unless Mr. Williams rejected the proffered plea; and that this deficient performance resulted in prejudice to Mr. Williams because he was unable to accept a plea bargain offered him by the prosecution. I accept, at least for argument's sake, all but the last link in this chain.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." To be meaningful, the right to counsel necessarily embraces a right to *effective* counsel. *McMann v. Richardson,* 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). In *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court established the familiar two-prong test courts use to evaluate whether a lawyer's assistance was constitutionally ineffective. First, the defendant must show that his or her

lawyer's performance was "deficient." To establish deficiency, the defendant must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and show that it was objectively unreasonable. *Id.* at 687-89, 104 S.Ct. 2052. Second, the defendant must show that the lawyer's deficiency caused prejudice to his or her defense. *Id.* at 687, 104 S.Ct. 2052. Prejudice is normally established by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Applying these principles here, I do not doubt that Mr. Williams's right to counsel attached by the time of his plea negotiations, which occurred after judicial proceedings commenced. *See Brewer v. Williams*, 430 U.S. 387, 398-401, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Because Mr. Williams's right to counsel embraces a right to *effective* counsel, I also accept that he had a right to effective representation in his plea negotiations with the government. *See Brady v. United States*, 397 U.S. 742, 748 n. 6, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) ("[A]n intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney. . . ."); *see also Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct.

663, 54 L.Ed.2d 604 (1978) (advice of competent counsel is a procedural safeguard enabling voluntary and intelligent plea bargaining).

Nor do I question the OCCA's conclusion that Mr. Williams's counsel performed deficiently in the plea negotiation process. The OCCA held that, by threatening to withdraw on the eve of trial if Mr. Williams accepted the plea offer, counsel usurped Mr. Williams's right to decide how to plead to the charges against him. So it was that the lawyer, rather than the client, effectively decided whether or not to accept the government's proffered plea. And this, the OCCA held, represented an affront not merely to professional rules of conduct, but to the rightful allocation of authority between lawyer and client – between the agent who advises and assists in the criminal process and the principal who must endure any sentence that process yields. *See Florida v. Nixon*, 543 U.S. 175, 187, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004) ("A defendant . . . has the ultimate authority to determine whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.") (quotations omitted); *see also* Oklahoma Professional Conduct Rule 1.2(a) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered."); ABA Model Rule of Professional Conduct 1.2(a) (same); ABA Standard for Criminal Justice 4-5.2(a) ("Certain decisions relating to the conduct of the case are ultimately for the accused. . . . includ[ing] (i) what

pleas to enter; (ii) whether to accept a plea agreement; (iii) whether to waive a jury trial").

At the same time, though improper, counsel's actions were apparently undertaken in good faith. Counsel refused to aid Mr. Williams in accepting the plea because he was absolutely convinced by his client's initial protestations of innocence. He saw no reason for an innocent man to plead guilty to the charges against him and spend ten years in prison. He also seemed to fear that securing the plea bargain might involve him and Mr. Williams in perjury, because Mr. Williams would have to admit guilt to a crime he (counsel thought) didn't commit.[2]

Ultimately, though, counsel's good faith is beside the point. If the lawyer *knew* his client were innocent, or at least had reasonable grounds to believe it, his concerns about participating in a potential perjury might have some currency. *See* ABA Rules 1.2(d); 3.3(a)(3); 1.16(b)(2). But here, particularly in light of the substantial evidence of Mr. Williams's guilt, counsel had no such grounds. I cannot disagree with the OCCA that

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[2] While a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), might have permitted Mr. Williams to maintain his factual innocence while pleading guilty, the prosecutor's offer in this case was, all sides agree, contingent on a guilty plea in which Mr. Williams had to admit responsibility for the crime.

it would be foolish to deny the fact that criminal defendants often lie to their own attorneys concerning their criminal culpability. . . . Unless defense counsel personally witnessed the crime or has hard proof as to what precisely happened there, he cannot really take the position that his client is committing perjury by pleading guilty.

OCCA Op. at 23. This is not to say that I think Mr. Williams initially deceived his lawyer. But I do agree with the OCCA that a lawyer cannot reasonably discount that possibility without real evidence to the contrary. Mr. Williams's lawyer had no such evidence. In that light, I see no reason to disturb the OCCA's conclusion that counsel's refusal to help secure the plea and threat to quit on the eve of trial amounted to deficient performance.

II

Prejudice is the critical question in this case. Mr. Williams argues that, once the State made a plea offer, he had a right, emanating from the Sixth Amendment's right to effective representation, to be appropriately counseled about the consequences of accepting or rejecting the plea. Counsel's failure to advise him properly, Mr. Williams submits, amounts to prejudice within the meaning of the Sixth Amendment. At least one court, *People v. Curry*, 178 Ill.2d 509, 227 Ill.Dec. 395, 687 N.E.2d 877 (1997), has adopted this line of reasoning. In *Curry*, the Supreme Court of Illinois held that the Sixth

Amendment contains a right "to be reasonably informed as to the direct consequences of accepting or rejecting that offer," *id.* at 888, and that the loss of this right qualifies as prejudice within the meaning of *Strickland*. In concluding that Mr. Williams had suffered a Sixth Amendment violation, the OCCA seemed to take much the same view.

This logic, however, collapses deficient performance and prejudice. Under *Curry*'s rationale and the OCCA's, a violation of the Sixth Amendment is complete the moment a lawyer fails to advise his client adequately about the consequences of a plea. That is, the lawyer's bad advice (deficient performance) deprives the client of a right to good advice (prejudice). The Supreme Court has repeatedly warned against this fallacy, reminding us that some *independent* showing of prejudice must be made. "The requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there – *effective* (not mistake-free) representation. Counsel cannot be 'ineffective' unless his mistakes have harmed the defense. . . . [A] violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006); *see also Strickland*, 466 U.S. at 691, 104 S.Ct. 2052 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no

effect on the judgment."). Put differently, bad advice isn't enough. Some harm to the defense must follow. Calling a lawyer's incompetence both deficient performance *and* prejudice misconstrues the Supreme Court's test.

Given that the OCCA's prejudice analysis is not defensible, we might ask whether there is some other basis for finding prejudice in Mr. Williams's case that warrants remedy. The usual ineffective assistance claim in the plea bargaining context involves a defendant who has pled guilty as a result of poor legal advice. In such cases, we readily find prejudice because the waiver of the right to trial must be a "voluntary . . . knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady,* 397 U.S. at 748, 90 S.Ct. 1463. If counsel provided unsound advice, and that advice resulted in a guilty plea, the defendant's waiver of the right to trial cannot be said to have been made freely, knowingly, and intelligently. *Hill v. Lockhart,* 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Prejudice accrues because "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59, 106 S.Ct. 366. That is, the defendant is prejudiced by the lost right to test the government's evidence at trial.

This case is different. Mr. Williams pled *not* guilty to the charge against him. And a not-guilty plea is a waiver of nothing; it is an *invocation* of the constitutional right to a trial, and it is effective

whether or not it is made knowingly and voluntarily. So Mr. Williams cannot and does not challenge the validity of his not-guilty plea; he must identify some other source of prejudice. What might that be?

Mr. Williams argues that prejudice can be shown from the fact that he lost a good chance at a ten-year sentence, and instead received a life sentence. Though at first blush this sounds like a complaint that his *sentence* is the result of ineffective assistance, that isn't quite right. It is undisputed that the ten-year sentence Mr. Williams desires is unavailable for a person convicted of first degree murder in Oklahoma; life with the possibility of parole is the statutory minimum for that offense. Thus, it would have been unlawful for the Oklahoma court to convict Mr. Williams of first degree murder, as it did, and then impose a sentence less than life with the possibility of parole. Because Mr. Williams cannot legally obtain a ten-year sentence for first degree murder, he cannot complain that his attorney was ineffective for failing to secure such a result. A defendant, of course, cannot claim prejudice from the loss of something the law forbids. *See, e.g., Nix v. Whiteside,* 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986) (no prejudice from failure to present perjured testimony).

Mr. Williams's claim of prejudice must begin with his *conviction* for first degree murder. His argument is and has to be that his lawyer's ineffectiveness rendered his first degree murder conviction invalid; that it should be vacated; and that he should be

permitted to plead to a second degree murder charge instead – only that way would he become eligible for the ten-year sentence he seeks. But here, too, there is a twist. In the ordinary *Strickland* challenge to a conviction, the defendant argues that, because of counsel's incompetent acts or omissions, he did not get a fair or reliable trial; therefore, the resulting conviction is unlawful. Mr. Williams's claim is just the opposite. He claims that because of his lawyer's incompetence, he *did* get a fair and reliable trial leading to his first degree murder conviction. So the question Mr. Williams poses now becomes clear: Can a defendant be prejudiced, in the Sixth Amendment sense, by the loss of a plea bargain if he is later convicted only after an entirely fair trial?

I think not. The Sixth Amendment right to counsel, along with the right to counsel of one's choice, form the "root meaning of the constitutional guarantee" of the Sixth Amendment. *Gonzalez-Lopez*, 548 U.S. at 147-48, 126 S.Ct. 2557. When a defendant is deprived of these rights, no further showing of prejudice is necessary – the deprivation of counsel altogether, or the deprivation of counsel of one's choice, *is* the loss of a constitutional right. *See id.* at 148, 126 S.Ct. 2557. By contrast, the Supreme Court has told us, the Sixth Amendment "right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The right to effective

representation originated in the Due Process Clause, which prohibits the government from depriving any person of liberty by fundamentally unfair or unreliable procedures. *Gonzalez-Lopez,* 548 U.S. at 147, 126 S.Ct. 2557; *McMann,* 397 U.S. at 771 n. 14, 90 S.Ct. 1441; *Powell v. Alabama,* 287 U.S. 45, 70-71, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Because the right to effective assistance exists to serve the underlying purpose of ensuring a fair trial, a violation of the right requires some showing that counsel's deficiency impacted the fair trial right. *Gonzalez-Lopez,* 548 U.S. at 147, 126 S.Ct. 2557. As the Court has put it, "[h]aving derived the right to effective representation from the purpose of ensuring a fair trial, we have, logically enough, also derived the limits of that right from that same purpose." *Id.* "Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Cronic,* 466 U.S. at 658, 104 S.Ct. 2039.

A fair trial process, in turn, is one in which the defendant is afforded the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Id.* at 656, 104 S.Ct. 2039. When the outcome of the trial may have been altered by a defense lawyer's failure to subject the government's case to appropriate adversarial testing, then the resulting conviction was not the result of a fair trial. *See id.* at 656-57, 104 S.Ct. 2039; *see also Strickland,* 466 U.S. at 694-96, 104 S.Ct. 2052. But "[w]hen a true adversarial criminal trial has been conducted –

even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occu red," and no constitutionally cognizable prejudice can be said to exist. *Cronic*, 466 U.S. at 656, 104 S.Ct. 2039. Accordingly, "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686, 104 S.Ct. 2052. When, as here, "a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent [counsel's] errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695, 104 S.Ct. 2052.

Mr. Williams cannot show prejudice under this standard. He does not say that his lawyer should have called this witness, won the exclusion of that piece of evidence, or pressed this legal defense. Put in *Strickland*'s terms, he does not suggest that anything his lawyer could have done would have induced the jury to have "a reasonable doubt respecting [his] guilt" for first degree murder. *Id.* Rather, he says the jury would never have been empaneled in the first place.

No doubt that would have been better for Mr. Williams, but it has nothing to do with the question posed by *Strickland*. Prejudice is not established simply because, but for some accident or misfortune, the fair trial leading to a conviction would have been somehow averted. It must be that some doubt is

raised about whether the conviction was obtained only because the prosecution's case was not competently contested. A conviction for first degree murder at trial is no less the result of a meaningful adversary contest just because the defendant's lawyer failed to allow his client to be convicted of some *other* crime by some other procedure.

Put differently, rather than have us review the fairness of the trial that did deprive him of liberty, as *Strickland* requires, Mr. Williams's claim would have us examine the plea negotiation that did not. But that is not the relevant inquiry. In fact, Mr. Williams's attempt to shift our focus from the fairness of the trial that took place to an abandoned plea deal is foreclosed by the Supreme Court's decisions in *Mabry v. Johnson*, 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984), *abrogated on other grounds by Puckett v. United States*, ___ U.S. ___, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009), and *Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977).

In *Mabry*, the government offered a plea on a Friday and the defendant pondered it over the weekend. When defense counsel called on Monday to accept the deal, the prosecutor said the offer was a mistake and withdrew it. In its place, the government offered a new bargain with a harsher sentence, which the defendant accepted. The defendant later sought the benefit of the original bargain in court, arguing that due process principles precluded the government from reneging on its deal. The Sixth Circuit agreed, holding that "fairness" prevented the government

from withdrawing the original plea offer after it had been accepted. *Mabry,* 467 U.S. at 506, 104 S.Ct. 2543. But the Supreme Court reversed, stressing that it was not the original, abandoned plea bargain that deprived the defendant of his liberty; it was the guilty plea he actually entered. And the Court explained that only the plea that deprived the defendant of his liberty mattered:

> A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution. Only after respondent pleaded guilty was he convicted, and it is that conviction which gave rise to the deprivation of respondent's liberty at issue here.

Id. at 507-08, 104 S.Ct. 2543. The sole question implicating the Constitution, the Court held, was whether the eventual guilty plea that *did* deprive the defendant of his liberty was voluntary and intelligent. *Id.* at 508-09, 104 S.Ct. 2543. Even if the prosecutor was "negligent or otherwise culpable" in rejecting the original plea, the Constitution's concern is *only* "with the manner in which persons are deprived of their liberty." *Id.* at 511, 104 S.Ct. 2543.

The story of *Weatherford* is similar. There, the defendant complained that government misconduct (an undercover government agent, pretending to be a

co-defendant, sat in on discussions with defense counsel) prevented him from having even the *opportunity* to bargain for a plea. This court agreed that due process was offended, but the Supreme Court again reversed. While the prosecution likely engaged in misconduct, and while its misconduct may have denied the defendant the opportunity to engage in plea bargaining, the defendant "was not denied a fair trial." *Weatherford,* 429 U.S. at 560, 97 S.Ct. 837. A lost opportunity to pursue a negotiated plea was of no moment.

The majority says our case is distinguishable because the prosecutor here neither declined to extend an offer nor revoked an offer already extended – that is, a different sort of problem kept Mr. Williams's plea deal from being embodied in a court's judgment. Maj. Op. at 1091. But the question we face isn't whether the particular accident befalling Mr. Williams is the same particular accident that befell Mr. Mabry and Mr. Weatherford. That one petitioner has brown eyes and another blue usually makes no difference in the eyes of the law. Our job isn't to ask whether cases are factually identical but whether, by their terms, the *rules of law* set forth by the Supreme Court do or do not apply to our case. And the rule of *Mabry* and *Weatherford* – that constitutional scrutiny is applied only to the procedure that deprives the defendant of his liberty, and that executory plea bargains do not – is no less applicable to Mr. Williams than it was to the defendants in those cases. The

historical happenstance of why Mr. Williams's plea remained executory is neither here nor there.

The only other conceivable difference one might imagine between our case and *Mabry* and *Weatherford* is that, in those cases, the defendant complained of prosecutorial misconduct under the due process clause, while the defendant in our case complains of defense counsel misconduct under the Sixth Amendment. But this distinction makes no more difference than the court's. The Sixth Amendment right to effective representation is an instrumental right whose purpose is to serve the very same due process ends at issue in *Mabry* and *Weatherford* – to ensure that the defendant's liberty is taken, if at all, only after a fundamentally fair process. If the prosecution does not trench on that objective by irrationally withdrawing a proffered plea when the defendant is later fairly convicted, defense counsel cannot do so by irrationally insisting that a client reject such a plea when the defendant is later convicted at a fair trial. If *Mabry* and *Weatherford* remain the law and the Constitution remains concerned only with "the manner in which persons are deprived of their liberty," not with how they are not, then we must conclude that no prejudice to a constitutional interest took place here.

III

One might ask why *Mabry* and *Weatherford* hold as they do. Why do we care about trials that deprive

defendants of their liberty but not botched plea deals that don't? The most obvious answer of course is that the latter don't result in incarceration, and the Constitution cares only about processes that do. But there is even more to it than that. As both *Mabry* and *Weatherford* intimate, a lost plea deal implicates neither *Strickland*'s concern with ensuring a reliable result nor its concern with ensuring fair treatment. A fair trial's outcome is as reliable an outcome as we can hope to achieve. And because the plea bargain is a matter of prosecutorial grace, not a matter of legal entitlement, a defendant who loses the chance for a deal cannot be said to have been treated unfairly.

A

In the terms of *Strickland*'s prejudice prong, the loss of a plea bargain does not "undermine confidence" in the outcome of a subsequent fair trial. The American Constitution, our Bill of Rights, and our common law tradition place faith in the trial as the best means of protecting a defendant's rights, testing the government's case, and ensuring a reliable result. It is a foundational principle of our system of justice that a fair trial, imperfect though it and all human affairs surely are, offers the greatest assurance we have yet devised of a reliable resolution of a criminal charge. The guarantee of a fair trial is the bulwark of our national liberty.

This isn't to say plea bargaining has no place. But unlike a trial, plea bargaining is not designed to

subject the prosecution's case to testing or to ensure that a defendant goes to jail only if no reasonable doubt remains about his or her guilt. In fact, plea bargains guarantee that some persons who would have been acquitted never receive a trial at all and instead serve time in prison. In part for this reason, the common law was hostile even to the uncompensated guilty plea, fearing that the innocent (and perhaps especially the innocent) would feel pressured to convict themselves either out of fear or hope of mercy.[3] The Supreme Court, in more recent years, has acknowledged the value of plea bargains in efficiently disposing of criminal cases. *Santobello v. New York*, 404 U.S. 257, 261, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). According to the Court, plea bargaining

> leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative

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[3] *See* Albert W. Alschuler, Plea Bargaining and its History, 13 Law & Soc'y Rev. 211, 223 (1979) ("[T]he poor, friendless, helpless man is most apt to become the one who helps swell the record of convictions.") (internal quotation marks omitted). Mr. Williams's counsel was, of course, convinced that Mr. Williams's wish to plead guilty represented an example of just this phenomenon.

> prospects of the guilty when they are ultimately imprisoned.

Id.; *see also* George Fisher, Plea Bargaining's Triumph: A History of Plea Bargaining in America (2003). But notably missing from the Court's recitation of the plea bargain's virtues is any suggestion that, compared to the trial as evolved through history and guaranteed by law, plea bargaining enhances the reliability of the outcome. When it comes to that – when it comes to the confidence we repose in the outcome of a criminal proceeding – the trial remains our gold standard.[4]

The fact that some lost opportunities in the criminal process do not undermine confidence in the ultimate result (and therefore do not constitute

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[4] On one famous account, plea bargains remain nothing more than coerced guilty pleas. *See generally* John H. Langbein, Torture and Plea Bargaining, 46 U. Chi. L.Rev. 3 (1978). Others respond that the plea bargain reflects the probability of conviction and various possible sentences, each discounted for their likelihood, in a sort of net present value analysis. *See* Frank H. Easterbrook, Criminal Procedure as a Market System, 12 J. Leg. Stud. 289, 316-17 (1983). On either account, however, the rational plea bargain combines two things the law keeps separate: the risk of conviction at trial and the probable sentence upon conviction. As the length of possible sentences increases, the number of guilty pleas goes up as well – even though the number of acquittals at trial presumably would stay the same. This is why whatever degree of reliability is produced by plea bargaining will always be less than that produced by a trial. And it is why the loss of a plea bargain can never undermine confidence in the result produced by a more reliable procedure.

prejudice), so long as the defendant receives a fair trial, is nothing novel. Consider, for example, the lawyer who is ineffective at a trial that (fortuitously) results in a hung jury. If, on retrial, the lawyer performs perfectly and the defendant is convicted, we would not direct our gaze to the prior ineffectual proceeding and provide a remedy for counsel's deficiency. The first trial did not deprive the defendant of liberty, and the trial that did was fair. Accordingly, our confidence in the outcome is unshaken by counsel's prior deficient performance. That would end the matter in such a case, much as it did in *Mabry* and *Weatherford,* and much as it should here.

Consider, too, the grand jury setting. Like a pretrial plea negotiation, proceedings before a grand jury usually determine whether there will be a trial at all. In *United States v. Mechanik,* 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986), the government violated Fed. R.Crim. 6(d) by permitting two witnesses to testify simultaneously before the grand jury. This was misconduct, and the Court assumed it might have warranted dismissal of the indictment had it been brought to the district court's attention before trial. *Id.* at 69-70, 106 S.Ct. 938. But instead the trial proceeded to conviction, and the Supreme Court held that this fact rendered "any error in the grand jury proceeding . . . harmless beyond a reasonable doubt." *Id.* at 70, 106 S.Ct. 938. That was so because "the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they

are in fact guilty as charged beyond a reasonable doubt." *Id.* Thus, even when a criminal trial might have been averted through the assertion of an entitlement to dismiss the indictment outright, the fact that the defendant subsequently received a fair trial was enough to preclude reversal. It seems more than unlikely that the Constitution could be offended by a fair trial that occurs because of the loss of a plea bargain to which the defendant had no entitlement, but not by a fair trial that occurs only after counsel failed to pursue defendant's entitlement to a dismissal of the indictment.

B

Just as a trial without plea bargaining is no less reliable, neither is it any less fair. A fair criminal process is one in which the defendant was not deprived of "any substantive or procedural right to which the law entitles him." *Terry Williams v. Taylor,* 529 U.S. 362, 393 n. 17, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (quoting *Lockhart v. Fretwell,* 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993)). Fairness means that the defendant is treated according to law, with the full panoply of rights and entitlements it affords. The difficulty for Mr. Williams is that, under the separation of powers embodied in our Constitution, plea bargaining is a matter of prosecutorial grace, not right or entitlement.

It has been long settled that, in the absence of deliberate discrimination on the basis of some

protected equal protection status, such as race or religion, "the Executive Branch has exclusive authority and absolute discretion" to select its charge. *Greenlaw v. United States,* ___ U.S. ___, 128 S.Ct. 2559, 2565, 171 L.Ed.2d 399 (2008) (quotation omitted); *see also Bordenkircher,* 434 U.S. at 364-65, 98 S.Ct. 663. This means that a court may neither compel a prosecutor to bring a particular charge, *see, e.g., Inmates of Attica Correctional Facility v. Rockefeller,* 477 F.2d 375 (2d Cir.1973), nor refuse to dismiss a charge when the prosecutor requests it, *Rinaldi v. United States,* 434 U.S. 22, 98 S.Ct. 81, 54 L.Ed.2d 207 (1977). Likewise, a defendant cannot compel the prosecutor to bargain at all if he does not want to, *Weatherford,* 429 U.S. at 561, 97 S.Ct. 837, or even prevent the prosecutor from reneging on an agreement after it is accepted. *Mabry,* 467 U.S. at 510, 104 S.Ct. 2543. Neither may a defendant force the trial judge to adopt an accepted bargain if the prosecutor does choose to abide the agreement. *Santobello,* 404 U.S. at 262, 92 S.Ct. 495. In short, plea bargains are products of executive prerogative, not legal entitlement.[5]

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[5] The point here is that even an *accepted* plea bargain confers no constitutionally protected interest on the defendant until it is reduced to a judgment of the court – and even then it is the court's judgment, not the agreement itself, that forms the basis of a defendant's entitlement. *Mabry,* 467 U.S. at 507-08, 104 S.Ct. 2543. This is not to suggest that a defendant has no remedies to prevent the government from gaining an unfair advantage from his reliance on a plea agreement before the

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Absent a loss of a legal entitlement, the defendant can claim no prejudice. So, for example, in *Fretwell* the Supreme Court held that, even though a defendant's lawyer failed to raise a point of law at sentencing that would have spared his client the death penalty, there could be no prejudice because the legal proposition was overruled by the time the case reached habeas review. 506 U.S. at 367-68, 113 S.Ct. 838. Despite the fact that the defendant *could have* secured a life sentence at the time of his hearing by raising a then-effective legal argument, and despite the greatest possible difference in outcome produced by counsel's omission – a sentence of death rather than life – the Supreme Court ruled that giving the defendant the benefit of a legal argument later held erroneous would have improperly "grant[ed][him] a windfall to which the law does not entitle him." *Id.* at 370, 113 S.Ct. 838. There was, in the Court's view, nothing unfair about the fact that the defendant was sentenced to death under the proper legal standard, even if his life could have been saved by raising an erroneous legal argument available at the time of his trial. The absence of legal error cannot undermine confidence in a trial. *See id.* at 369, 113 S.Ct. 838 ("[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or

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court accepts it. It's just to say that the defendant has no entitlement to the agreement itself before it is reduced to a judgment.

unreliable, is defective."). As Justice Blackmun explained, when the defendant has been "deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice." *Nix,* 475 U.S. at 186-87, 106 S.Ct. 988 (Blackmun, J., concurring in the judgment).

No different conclusion is fairly possible here. Mr. Williams cannot claim any substantive or procedural right to accept or enforce the prosecutor's plea offer. To the contrary, because the plea was never embodied in the court's judgment, it remained a matter of pure executive discretion and could be withdrawn at whim. Without any entitlement to the plea, Mr. Williams cannot complain that the loss of it was unfair. As the Seventh Circuit noted in the face of a claim similar to Mr. Williams's, a defendant has no "entitlement to a discount of any kind, no right to be treated more leniently than other criminals unlucky enough to be without information for which the prosecutor is willing to pay." *United States v. Springs,* 988 F.2d 746, 749 (7th Cir.1993).[6]

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[6] Perhaps Mr. Williams could show prejudice by demonstrating that his counsel denied him, not a federal right, but some entitlement arising from state law. When it comes to plea agreements, however, Oklahoma law appears to track federal law in all pertinent respects. According to the OCCA, even when a plea bargain has been agreed upon by both prosecutor and defense counsel, the prosecutor is free to withdraw it and the defendant may not compel compliance with the deal. *Ross v. State,* 717 P.2d 117, 122 (Okla.Crim.App.1986). Because "plea bargaining is a discretionary matter with the

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Mr. Williams would surely respond that, while the law did not *entitle* him to accept or enforce the plea bargain, neither did the law forbid it; he at least had the *opportunity* to pursue the prosecutor's offer. The problem with this line of argument is that constitutional prejudice arises only from the loss of a legal entitlement, not from the loss of a merely lawful opportunity. That this is so is illustrated not only by the *Fretwell* line of cases, but by *Strickland* itself. In *Fretwell,* the defendant surely lost the opportunity to take advantage of a favorable legal rule that would have spared him a death sentence; pursuing that opportunity was legally permissible at the time of trial, yet the Court held no prejudice attached from counsel's failure to do so. In *Strickland,* the Court emphasized that Sixth Amendment prejudice analysis can take no account of "the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like. A defendant has no *entitlement* to the luck of a lawless decisionmaker." 466 U.S. at 695, 104 S.Ct. 2052 (emphasis added). So, for example, the Court noted that nothing prevents defense counsel from appealing to a judge's known tendency to be lenient in sentencing first-time offenders. But, while a

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prosecutor," the OCCA has held that Oklahoma courts may not compel the district attorney to reinstate a plea offer once withdrawn. *State ex rel. Stout v. Craytor,* 753 P.2d 1365, 1368 (Okla.Crim.App.1988); *see also Gray v. State,* 650 P.2d 880, 883 (Okla.Crim.App.1982) ("The recognition of plea bargaining as an essential component of the administration of justice . . . does not elevate it to a constitutional right.").

lawyer's failure to exploit that tendency at trial or sentencing might be relevant to the question of deficient performance, it is "irrelevant to the prejudice inquiry." *Id.* This is because a sentencing judge's "unusual propensities toward harshness or leniency," must be excluded from consideration. *Id.* This sort of thing is "lawless" decisionmaking – not in the sense that it is illegal or even unseemly, but in the sense that it is not governed by legal standards, not part of the process that is "due" according to law. *See id.* A defendant has no "entitlement" to it.

Plea bargaining is an even more discretionary activity than sentencing. Suppose that, rather than a judge, it is the *prosecutor* who is known to be sympathetic to first-time offenders. A defendant's lawyer knows that if he goes to see the prosecutor and makes a pitch, it is very likely the prosecutor will drop the charge entirely. If the lawyer fails to do this, he or she will have unreasonably failed to take advantage of a legally permissible opportunity for the client. But that is hardly "prejudice" within the meaning of the Sixth Amendment. For what would the rationale be for granting relief for counsel's failure to take advantage of the lawless leniency of a prosecutor, in an out-of-court setting, but not that of the judge at the sentencing hearing that leads to the judgment being attacked in habeas corpus? In both scenarios, the lawyer's incompetence makes a difference to the client. A lawful opportunity was lost. But in neither case could the defendant complain that he

or she was deprived of a legal entitlement such that the judgment of conviction was unfair.

The majority mistakes the nature of this analysis in two ways. First, it suggests that I read the Sixth Amendment to protect only "trial rights in connection with guilt or innocence." Maj. Op. at 1093. But I have asked not only whether counsel's conduct affected the reliability of Mr. Williams's criminal proceeding (what the majority calls the "guilt or innocence" question). I have *also* asked whether, even if Mr. Williams's criminal proceeding was reliable, counsel's deficient performance nonetheless rendered it unfair by denying him *any* substantive or procedural right to which the law entitles him. The difference between these questions can be illuminated by an example. A defendant's right to exclude evidence under the Fourth Amendment has nothing to do with "guilt or innocence," which is one reason why the trial court's failure to vindicate this right is not a basis for habeas corpus. *Stone v. Powell,* 428 U.S. 465, 486, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). But, because defendants enjoy a legal entitlement to suppress evidence unlawfully seized, a lawyer's failure to raise a good exclusionary rule objection might still render the result of his criminal proceeding unfair and thus prejudicial in a Sixth Amendment sense. *See Owens v. United States,* 387 F.3d 607 (7th Cir.2004). Contrary to the majority's suggestion, it is of no moment for purposes of my analysis whether the particular legal entitlement lost by a defendant exists to ensure a reliable verdict or to deter police misconduct or for

any other purpose. The relevant question is whether Mr. Williams received the legal protections to which he was entitled at law. He did because he cannot identify any source of law that entitles him to the plea deal he lost.

Second, the majority claims that I have "superimpos[ed] another requirement on the prejudice inquiry" by asking whether Mr. Williams's lost plea implicates either the reliability or the fairness of his criminal proceeding. Maj. Op. at 1094. This appears to be an allusion to a species of error certain courts fell prey to in the wake of *Fretwell*: requiring an additional, *quantitative* inquiry into how large the difference in outcome produced in any particular case probably was, and denying relief if, in the court's judgment, the difference wasn't sufficiently large. So, for example, in *Durrive v. United States*, 4 F.3d 548, 550-51 (7th Cir.1993), the Seventh Circuit refused to afford a *Strickland* remedy when counsel's deficient performance produced a marginal but real effect on the defendant's sentence. The Supreme Court rejected this approach as error in *Glover v. United States*, 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001). *See also Terry Williams*, 529 U.S. at 394-95, 120 S.Ct. 1495. It is not an error repeated here. The point of *Fretwell*, *Nix*, *Glover*, and *Terry Williams* is that certain acts or omissions by counsel may well affect the outcome, but *categorically* do not cause constitutionally cognizable prejudice because they have no effect on either the reliability or the fairness of the proceeding. We are thus told to ask a *qualitative*, not

quantitative, question: Did "unreliability or unfairness result" by dint of counsel "depriv[ing] the defendant of a substantive or procedural right to which the law entitles him?" *Glover*, 531 U.S. at 203, 121 S.Ct. 696 (quoting *Terry Williams*, 529 U.S. at 393, 120 S.Ct. 1495). And this question, the Supreme Court has insisted, is part of *Strickland*, not an adjunct to it.

It is also a question that, again, surely must be answered "no." Mr. Williams was deprived of his liberty only after a proceeding in which, in the words of the Magna Carta, "the judge or jury acted according to law." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The outcome of his trial was not just reliable but also fair, according him all protections to which he was entitled by law. The Sixth Amendment requires no more. As Justice White explained for the Supreme Court, "[i]t is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty." *Weatherford*, 429 U.S. at 561, 97 S.Ct. 837.

C

The majority's alternative prejudice analysis does not confront the central concern I have just laid out – namely, that prejudice cannot exist unless our confidence in the reliability or fairness of Mr. Williams's trial is undermined, and the loss of a plea bargain categorically undermines neither. In one place, the majority suggests that prejudice arises because "had

[Mr. Williams] been adequately counseled, there is a reasonable probability he would have accepted the plea offer." Maj. Op. at 1094. But to the extent this might be read as suggesting that bad legal advice constitutes prejudice, it falls in to *Curry*'s trap, mixing *Strickland's* deficient performance and prejudice prongs. *See supra* Part II. And to the extent this might be read as suggesting there is a legal entitlement to accept a plea offer, it fails to address the welter of legal authority from the Supreme Court holding otherwise. *See supra* Part III.B.

Elsewhere, the majority asserts flatly that "counsel can be ineffective where his mistakes have harmed the defense" and "[s]urely, the plea process is part of the defense." Maj. Op. at 1092 (internal quotation marks omitted). But here again the majority does not explain the source of any legal entitlement to receive or accept a plea offer. It does refer us to *Hill v. Lockhart* and certain cases from other circuit courts. As I have already described, however, *Hill* explains merely that poor advice from counsel can render a *guilty plea* involuntary; it does not speak at all to the question of a defendant's legal entitlement to a good plea offer. And the circuit cases the majority cites do no more to fill the analytical void. In fact, the search for reasons to support a prejudice finding in these cases is something like a scavenger hunt. One case holds prejudice exists but cites us to another case for the reasons supporting this result. We are promised that, if only we look over there, all will be clear. When we get there, though, we are only

told again that we need to look somewhere else. And so we go on and on, bouncing from case to case, hoping that our persistence will eventually pay off with a prize. But opinions without reasons do not persuade; for what is the use of a book without pictures or conversations? Lewis Carroll, Alice's Adventures in Wonderland 9 (1898). Though it's possible I've taken a wrong turn somewhere in the hunt, at the end of it all the only prize seems to be an outdated 1982 case, *United States ex rel. Caruso v. Zelinsky,* 689 F.2d 435 (3d Cir.1982). Unlike the later cases that cite it and then cite each other, *Caruso* does offer reasons for its result. It explains in some detail how a lawyer's failure to advise his client about a plea bargain can amount to *deficient performance.* (I agree. Who doesn't?) The trouble is that the case does not even address the question of *prejudice.* Because it was decided before *Strickland* and *Cronic,* you might not fault *Caruso* for failing to contain a prejudice analysis. But neither would you expect it to be especially relevant to the prejudice analysis *Strickland* and *Cronic* now compel.[7] By contrast, Judge

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[7] The maze of authority emanating from *Caruso* looks something like this: The Third Circuit relied on it in *United States v. Day,* 969 F.2d 39 (3d Cir.1992), when that court held, without further analysis, that the right to effective assistance guarantees more than a fair trial. *Id.* at 44-45. In turn, *Day* contributed to the three Ninth Circuit cases on which the majority relies today. The first, *United States v. Blaylock,* 20 F.3d 1458, 1466 (9th Cir.1994), relied on *Day* for the proposition that a lost plea bargain can cause prejudice. There was no further explanation. *Cf. id.* at 1465 (citing *Caruso* for finding

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Easterbrook's analysis in *Springs* is compelling (whether or not the Seventh Circuit has since forgotten about it), and the Utah Supreme Court's rejection of prejudice in *State v. Greuber,* 165 P.3d 1185, 1190 (Utah 2007), follows a careful and thorough analysis. *See also Bryan v. State,* 134 S.W.3d 795, 802 (Mo.Ct.App.2004) (finding no prejudice); *State v. Monroe,* 757 So.2d 895, 898 (La.Ct.App.2000) (same); *Commonwealth v. Mahar,* 442 Mass. 11, 809 N.E.2d 989, 996 (2004) (Sosman, J., concurring). This case forces us to pick between competing lines of authority already once the subject of a grant of *certiorari;* the line of authority on which

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deficient performance). The next case, *Nunes v. Mueller,* 350 F.3d 1045, 1052-53 (9th Cir.2003), principally relies on *Blaylock* and *Day,* and repeats a variation on the argument advanced in *Caruso.* Finally, *Hoffman v. Arave,* 455 F.3d at 941-42, simply cites *Nunes* and a few other cases that either can themselves be traced back to *Day, e.g., Wanatee v. Ault,* 259 F.3d 700 (8th Cir.2001), or do not confront the question whether a subsequent fair trial precludes a finding of prejudice, *e.g., Cullen v. United States,* 194 F.3d 401, 403 (2d Cir.1999). Like the majority today, *Wanatee* simply cites *Hill v. Lockhart,* and then holds out the promise that persuasive reasons for applying *Hill* in this context will be found somewhere else. 259 F.3d at 703-04. The case to which the reader is referred, of course, relies on *Day* and a familiar list of other precedents that similarly contain no real analysis. *See Engelen v. United States,* 68 F.3d 238, 241 (8th Cir.1995). Other lines of cases supporting the majority's result, such as the Sixth Circuit's, appear to amount to the repetition of what started as *ipse dixit. See Turner v. Tennessee,* 858 F.2d 1201, 1206 (6th Cir.1988) (finding prejudice), *vacated on other grounds,* 492 U.S. 902, 109 S.Ct. 3208, 106 L.Ed.2d 559 (1989), *reaffirmed on remand,* 940 F.2d 1000 (6th Cir.1991).

the court so heavily depends for its result is thin gruel compared to the substantial analysis offered by competing courts.

IV

Having found a violation of Mr. Williams's constitutional rights, and having held the OCCA's remedy inadequate to remedy that violation, the majority stops short of imposing a remedy of its own, instead telling the district court to devise one "that comes as close as possible to remedying the constitutional violation." Maj. Op. at 1093. But there should be no confusion, the part of this case that matters is over, finished, done. According to the majority, the Constitution is offended, a right guaranteed by the Sixth Amendment is infringed, when an attorney's deficient performance costs his client a plea bargain that appears in hindsight, after the trial's results are known, to have been a good one. The question that has divided lower courts for a decade is irrevocably decided in this circuit and binding on future panels. No further proceedings can alter this result – at least not in this court. *See Mazurek v. Armstrong*, 520 U.S. 968, 975, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997); Eugene Gressman et al., Supreme Court Practice § 4.18 (9th ed.2007).

The majority today not only finally resolves the critical merits question whether a constitutional violation has occurred, it requires a pointless proceeding on remand. In fact, the majority's instruction

to the parties that they should submit briefing to the district court on the proper remedy will surely engender a strange feeling of deja vu. We granted a COA, after all, specifically to resolve what remedy is constitutionally compelled in these circumstances; the parties' briefs and arguments before us have been largely devoted to this question; and it is of course a pure question of law. Neither, in fairness, is there much we can expect the district court to do to illuminate the matter further. Only two real options have been identified by the parties in their briefs and arguments or by all the many appellate courts who have trod this path before: giving Mr. Williams specific performance of the deal he lost or ordering some variation of a new trial. The district court will have to select one of these two options, the loser will appeal, we will read the same briefs again, and then we will have to make our choice.

Any examination of the remedial question, moreover, serves only to underscore one thing: the absence of anything in need of remedying in the first place. As the majority implicitly recognizes, the traditional habeas remedy of releasing the petitioner is obviously inappropriate. Mr. Williams himself hasn't asked for unconditional release, and with good reason: he admits to being guilty of second degree murder and wishes to be sentenced to ten years in prison for it. Of course, writs of habeas corpus are often conditionally drawn, specifying conditions by which the government may cure the constitutional problem with a prisoner's conviction and confinement short of release

(albeit on pains of release if the government fails to meet those conditions). But what condition might be appropriate here?

As the majority recognizes, one thing is certain: the OCCA's chosen remedy can't be it. Constrained by a state-law statutory minimum for those convicted of first degree murder, the best the OCCA said it could offer Mr. Williams was a discount to the lowest sentence authorized by Oklahoma law for that offense – life with parole. But Mr. Williams's federal habeas claim is that his first degree murder conviction was secured in violation of the Sixth Amendment. If, as the court says, he is right about that – if his conviction is the result of a *Strickland* violation – then whatever else must be done, his conviction must be vacated. Whatever new sentence ultimately might be imposed, a wrongful conviction visits an intolerable harm on a criminal defendant. Whether state law allows the OCCA to provide this remedy, to vacate Mr. Williams's conviction, is neither here nor there: It is the whole point of habeas that convictions secured in compliance with state law must be vacated if they violate the Constitution. And once Mr. Williams's conviction for first degree murder goes by the boards, so goes any sentence he received for that (unlawfully secured) conviction. He must be recharged by Oklahoma and found guilty in some lawful proceeding before he can be sentenced anew to any term of incarceration.

Rightly dissatisfied with the OCCA's remedy rejected by the majority, Mr. Williams urges us to

order specific performance of the lost plea bargain, which would involve vacating his first degree murder conviction and give him a ten-year sentence for second degree murder. Some of the courts to have preceded us down this road have offered such a remedy. *E.g., Hoffman,* 455 F.3d at 942-43; *Blaylock,* 20 F.3d at 1468-69. But they must be wrong, and wrong in a way that shows the absence of any constitutional right at stake. Even if Mr. Williams had managed to accept the plea offer, under Supreme Court precedent the prosecutor would have been free to withdraw it on a whim, and the state trial judge would have been free to reject it or to impose a different sentence than the one contemplated by the parties' plea. So ordering specific performance of plea agreement would not restore Mr. Williams to his original position; it would confer on him something he never had to begin with: a *legal entitlement,* as opposed to a *chance,* to obtain a ten-year sentence on a charge for second degree murder never brought by the State. Ordering such a remedy would effectively permit Mr. Williams to use the rubric of ineffective assistance to upend the plea bargaining process, transforming it from its historic role as an act of executive discretion to one of judicially enforceable right. We, rather than the State, would assume the job of selecting charges and offering plea terms.

More precisely restoring Mr. Williams to his original position would require something less: vacating the first degree murder conviction, ordering a new trial on that charge, while at the same time

forcing the prosecutor to offer the original plea bargain. Some courts have pursued variations of this new trial remedy. *E.g.*, *Turner*, 940 F.2d 1000. But this remedy still suffers the same problem that plagues the specific performance option: Mr. Williams doesn't have, and never did have, a right to the plea offer. Unless we decide to assume control of the executive prerogatives of the State of Oklahoma and force the prosecution to keep the offer open, the government would be free to alter or withdraw the plea offer the moment it is extended – or even after it is accepted – for any reason, or for no reason. The trial court, too, would be free to reject any plea. All we could guarantee Mr. Williams at the end of the day is a new trial for first degree murder. And this leads us to another problem: a trial is exactly what Mr. Williams wishes to avoid. He has already received an error-free trial, and it did not end as he hoped. We do not know whether a second prosecution would end any differently than the first one did. Perhaps Mr. Williams would get life without parole again, an even worse result for him than giving him no federal habeas remedy at all; perhaps, if witnesses' memories have faded or the prosecution makes missteps, he may be acquitted. But we do know this: if Mr. Williams fared better the second time around, it would not be because a more reliable or fair process was used than the one the Constitution provided the first time. If a fair trial is the right remedy, then in a real sense he's already received it.

And this tells us all we need to know. The fact that a defendant who complains his conviction was secured as a result of a *Strickland* violation believes a new, fair trial would be inadequate to remedy his complaint strongly suggests that the *Strickland* right – aimed at securing just such a trial – was not infringed. The disarming reason why square pegs do not fit into round holes is that they are not round.[8] *Strickland* seeks to assure defendants of reliable and fair criminal proceedings, conducted according to law; that is what Mr. Williams received. Mr. Williams would have us follow him through the looking glass, to a world where a fair trial is called "prejudice"; where the results of a fair trial are void because of a lost opportunity rather than an infringed legal entitlement; and where a lawyer's incompetence transforms the executive plea bargain prerogative into a judicially enforceable entitlement. I do not believe the Sixth Amendment permits us to accompany him there. Respectful of my colleagues' contrary conclusion, I must dissent.

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[8] The majority claims I agree with it that the "OCCA's remedy is insufficient for the federal constitutional violation it found." Maj. Op. at 1093. Of course, my point is a different one – that there was no "federal constitutional violation" to remedy in the first place and so the OCCA's remedy was *more* than "sufficient."

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

MICHAEL JOE WILLIAMS,	)	
Petitioner,	)	**Case No.**
v.	)	**CIV 03-201-RAW-KEW**
JUSTIN JONES,[1]	)	
Respondent.	)	

REPORT AND RECOMMENDATION

(Filed July 31, 2006)

NOW before the Magistrate Judge is petitioner's petition for a writ of habeas corpus. Petitioner, an inmate currently incarcerated at Lawton Correctional Facility in Lawton, Oklahoma, attacks his conviction in Okmulgee County District Court Case Number CF-1997-188 for First Degree Murder. He sets forth the following grounds for relief:

I. Petitioner was prejudiced by the trial court's failure to instruct the jury that the testimony of accomplices required corroboration.

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[1] Petitioner named the warden of the private prison where he is incarcerated as the respondent. Because petitioner is incarcerated in a private facility, the proper respondent is Justin Jones, Director of the Oklahoma Department of Corrections. *See Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 494-95 (1973).

II. Petitioner was prejudiced by the prosecutor's improprieties during jury selection.

III. Petitioner was prejudiced by improper admission of a book-in photograph.

IV. Petitioner was denied his right to effective assistance of trial counsel.

V. Cumulative error supports reversal of petitioner's conviction.

The respondent concedes that petitioner has exhausted his state court remedies for the purpose of federal habeas corpus review and has submitted the following records to the court for consideration in this matter:

A. Petitioner's brief in his direct appeal.

B. The State's brief in petitioner's direct appeal.

C. Petitioner's second supplemental brief in his direct appeal.

D. The State's supplemental brief in petitioner's direct appeal.

E. Opinion affirming petitioner's conviction and modifying his sentence to life with the possibility of parole. *Williams v. State,* No. F-2000-1247 (Okla. Crim. App. Feb. 18, 2003).

F. Transcript of petitioner's sentencing proceeding in Okmulgee County District

Court Case Number CF-97-188, held on December 2, 1998.

G. Transcript of petitioner's evidentiary hearing in Okmulgee County District Court Case Number F-2000-1247, held on May 15, 2002.

Facts

The facts of this case were summarized by the Court of Criminal Appeals:

> In the early morning hours of June 9, 1997, someone entered Larry Durrett's Okmulgee trailer home and fired three shots at Durrett and his wife Delores while they were in bed asleep. Durrett jumped out of bed and pursued the assailant. Delores heard two more shots, someone leaving the trailer, and a car starting. She went and found her husband standing in the doorway, bleeding from the chest. She ran to the neighbors to call for an ambulance.
>
> Larry Durrett died later at the hospital. The State Medical Examiner testified he had received five gunshot wounds. The cause of death was gunshot wounds to the chest and abdomen. Five bullet casings were found inside the Durrett home by police investigators.
>
> The next day, the Glenpool police pulled over Debra Smith, due to her erratic driving. [Petitioner] was the front seat passenger. An

officer became suspicious when [petitioner] disobeyed orders to stay by the car and attempted to walk behind the officer. [Petitioner] was handcuffed for the officer's safety.

Smith's driver's license was suspended, and she was arrested on that basis. [Petitioner] could not drive, for his license was also suspended, and so the car was impounded. During a license check, the arresting officer learned [petitioner] was wanted for questioning in regard to an Okmulgee homicide.

During the car's inventory, officer's [sic] found a .22 rifle behind the driver's seat, inside a pair of blue jeans. Officers also found a wallet and identification belonging to Stacy Pearce, drug paraphernalia, suitcases packed with male and female clothing, and a newspaper with a story about Durrett's shooting.

A District Attorney's investigator learned the Glenpool police had [petitioner] and Debra Smith in custody and went to interview them. Upon seeing the items inventoried from the car, he obtained a search warrant.

A firearm's [sic] expert found the casings from Durrett's home matched the rifle found in Debra Smith's car. The rifle belonged to Stacy Pearce's mother.

William Ledford, a friend of the deceased, testified that [petitioner] came to his home

prior to these incidents asking for Larry Durrett in regard to some red phosphorus for making "dope." Ledford also claimed he helped [petitioner] locate Durrett on the day before the murder. Ledford heard [petitioner] ask about a .22 caliber gun. Upon finding Durrett, Ledford overheard Durrett say to [petitioner], "I heard you was going to shoot me in the back of the head."

Melinda Noies testified that [petitioner] told her Durrett owed him chemicals from a drug deal and that he intended to kill Durrett. Robert Frost, a district attorney's investigator, heard similar statements. [Petitioner] called Frost in May of 1997, seeking to become an informant against Larry Durrett. [Petitioner] said he wanted to set Durrett up or kill him.

When interviewed, [petitioner] claimed Durrett had not held up his end of a drug deal and so he went looking for Durrett on June 8, 1997, accompanied by Bill Ledford and Debra Smith. They met Durrett, who agreed to settle up with them the next day. That evening, Stacy Pearce and [petitioner] met for the purpose of doing crank. They returned to [petitioner's] parents [sic] house at some point that night and discussed going to Kansas to look for a job. [Petitioner] heard from Pearce and Smith two days later. They came and picked [petitioner] up in Tulsa. [Petitioner] was in Pearce's car and transferred two bags from that car into the car

that he and Debra Smith were driving when stopped.

Debra Smith was Larry Durrett's former girlfriend and testified she had an ongoing relationship with him until the day he died. Smith also dated [petitioner] during the same time. Smith claimed [petitioner] was jealous about her relationship with Durrett and had threatened to kill them both.

Smith confirmed the story about Durrett not keeping his end of a drug deal with [petitioner] and Stacy Pearce; [petitioner] believed Durrett had shortchanged him. Smith testified [petitioner] had been irate and looking for Durrett for some time, until Bill Ledford led [petitioner] to Durrett the day before Durrett was murdered. Smith heard Durrett ask [petitioner] if he had said he would cut off Durrett's head. [Petitioner] said he had not.

Smith testified that on the evening of June 8, 1997, [petitioner] and Pearce discussed going to Hanna for a drug deal and then, after meeting up with Tony Boswell, discussed meeting "Roley" in Hanna. [Petitioner] and Pearce left at about 10 p.m. and returned about 3:00 a.m. Smith overheard [petitioner] and Pearce discussing how Durrett and Boswell had "screwed" them over on the drug deal. [Petitioner] again threatened to kill Durrett. [Petitioner] and Pearce left, and Smith did not hear from them again until the next afternoon, when

[petitioner] called her from Tulsa and asked her to come pick him up.

During their phone conversation, Smith claimed [petitioner] was talking erratically and said she didn't have to be scared anymore. When she asked [petitioner] to explain what he meant, [petitioner] said, "Well, you don't have to worry about him anymore." She was eventually able to get [petitioner] to admit he was speaking of either Durrett or a man named Carl Brock.

Smith packed an overnight bag and drove to Tulsa to pick up [petitioner]. They met at an apartment alone. [Petitioner] was "real antsy." He wanted to watch the news and obtain a newspaper, but would not give Smith any details about what was going on. They got into Smith's car and [petitioner] fell asleep.

Smith drove to Cubby Shaver's house. Shaver then told Smith he had heard a rumor that Larry Durrett had been shot and killed. Smith claims she got hysterical and "fell apart." When the rumor was confirmed, she went to her car and told [petitioner] what had happened. [Petitioner] got angry with Smith and told her to settle down. According to Smith, [petitioner] then informed her he had shot Durrett. He then dropped Smith off at a friend's apartment.

The next day, June 10, Smith claims she met [petitioner] and Stacy Pearce at the apartment. When she attempted to leave,

[petitioner] grabbed and threatened her, saying she was "neck deep in this." [Petitioner] left her with Pearce and took off in Pearce's car. He returned that afternoon and handed Smith a newspaper story about Durrett's murder. [Petitioner] brought the gun and clothes for he [sic] and Pearce. Later that evening, after Pearce had left, [petitioner] began slapping Smith around while she was taking him to Tulsa to drop him off and then go home. She was then pulled over by the Glenpool police, arrested, and charged as an accessory after the fact on the murder.

Stacy Pearce, a co-defendant to the crime of First Degree Murder in this case, testified without any promises or agreements with the D.A.'s office concerning leniency. He and [petitioner] had been friends since high school and had agreed to try to make some money off methamphetamine, with Pearce helping to gather the materials. Debra Smith was also involved and had procured Larry Durrett to manufacture the drugs. But Smith landed in jail, and so [petitioner] wanted to raise money to get her out of jail.

Pearce claimed he, [petitioner], and Durrett agreed that Durrett would make the drugs, they would use the money to get Smith out of jail, and split what was left three ways. But Durrett took the chemicals and left. Pearce claimed [petitioner] was upset by Durrett's actions and said he would kill him.

According to Pearce, he and [petitioner] eventually hooked up with Tony Boswell, who had plans to manufacture drugs in Hanna. [Petitioner], Boswell, and Pearce traveled to Hanna. Pearce brought a .22 caliber rifle because he felt things were not right. Upon arriving, the trio was confronted by a group of people and wound up pouring the chemicals out on the ground. [Petitioner] believed Durrett was behind the incident and that Boswell was involved as well. The trio argued in the car about what Boswell knew and whether Durrett was involved. [Petitioner] put the gun to Boswell's head at one time.

Pearce and [petitioner] then went to Debra Smith's Henryetta apartment, but left again together about 2:30 a.m. They went to Okmulgee, and [petitioner] told Pearce he wanted to go talk to Durrett. Pearce then drove [petitioner] to Durrett's trailer. Pearce claimed [petitioner] took out the gun and stepped out of the car. Pearce believed [petitioner] intended to go kill Durrett.

Not long afterward, [petitioner] opened the car door and said, "Let's get the fuck out of here." As they left, [petitioner] told Pearce he had shot Durrett. They drove to the home of [petitioner's] parents.

[Petitioner's] mother testified she heard [petitioner] on the telephone at her home at 2:30 a.m. on the morning Larry Durrett was killed. She also testified that her husband

> got up at 5:30 a.m. and found [petitioner] and Pearce drinking coffee at the table. However, her husband had apparently given a statement indicating the time was 3:45 a.m.

Williams v. State, No. F-2000-1247, slip op. at 1-6 (Okla. Crim. App. Feb. 18, 2003). Petitioner was found guilty of First Degree Malice Aforethought Murder and sentenced to life imprisonment without the possibility of parole. *Id.* at 1. The state court's factual findings are presumed correct unless the applicant produces clear and convincing evidence to rebut the presumption. 28 U.S.C. § 2254(e)(1).

Ground I: Jury Instructions of Accomplice Testimony

In his first ground for relief, petitioner alleges the trial court erred when it failed to instruct the jury that testimony by accomplices Stacy Pearce and Debra Smith required corroboration. On direct appeal the Oklahoma Court of Criminal Appeals found that Pearce was an accomplice as a matter of law, and the court should have given an accomplice as a matter of law instruction regarding Pearce's testimony. *Williams,* slip op. at 8-9. The appellate court further found, however, that failure to give the instruction was harmless, because "'there [was] overwhelming evidence of guilt and the presence of sufficient corroborating testimony.'" *Id.* at 9 (quoting *Cummings v. State,* 968 P.2d 821, 831 (Okla. Crim. App. 1998)).

With respect to Debra Smith, petitioner argued on direct appeal that Smith's complicity was a fact question for the jury, while the State alleged she was not an accomplice at all. *Williams*, slip op. at 8. Smith was not indicted for murder, but as an accessory after the fact. *Id.* The OCCA found that, while the facts surrounding Smith's involvement "certain[ly] give rise to serious suspicions, they do not provide enough evidence to actually indict/charge Smith as an aider and abettor to the crime of murder." *Id.* at 9 (footnote omitted). Consequently, there was no error or plain error in failing to give an accomplice instruction about Smith's testimony. *Id.* "[B]ecause Smith cannot be considered an accomplice to the crime, a juror could infer her testimony was truthful without corroboration, and her testimony could then be used to corroborate Pearce's testimony." *Id.* at 9-10.

The respondent asserts the Oklahoma Court of Criminal Appeals considered and found no merit in this claim in petitioner's direct appeal, and under the revised federal habeas corpus statutes, habeas corpus relief is proper only when the state court adjudication of a claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of

> the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

In federal habeas review, the admission of evidence is a state law concern, unless the state trial court's decision is an error rising to the level of a due process violation. *See Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991). The OCCA found that Debra Smith's testimony was properly admitted, and petitioner has failed to show that the admission of Smith's testimony deprived him of due process.

Regarding Stacy Pearce's testimony, this court applies the harmless error standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and determines whether the error " 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Id.* at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). *See also Herrera v. LeMaster*, 301 F.3d 1192, 1200 (10th Cir. 2002) (en banc), *cert. denied*, 537 U.S. 1197 (2003). To warrant relief, petitioner must have suffered "actual prejudice." *Crease v. McKune*, 189 F.3d 1188, 1192-93 (10th Cir. 1999) (quoting *Brecht*, 507 U.S. at 637). "The factors that we consider include the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error." *Fowler v. Ward*, 200 F.3d 1302, 1308 (10th Cir.) (citing *United States v. Nyman*, 649 F.2d 208, 212 (4th Cir. 1980)), *cert. denied*, 531 U.S. 932 (2000), *overruled on*

other grounds, Moore v. Marr, 254 F.3d 1235, 1240 (2001).

Here, the court finds the trial court's error did not actually prejudice petitioner. This court agrees with the Court of Criminal Appeals' assessment of the strength of the evidence against petitioner and that the other corroborating evidence was sufficient. *See Williams,* No. F-2000-1247, slip op. at 9. This court further finds the trial court's erroneous ruling on the admissibility of Stacy Pearce's testimony did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637. Therefore, the Court of Criminal Appeals' decision regarding Pearce's and Smith's testimony was not contrary to or an unreasonable application of clearly established federal law. This ground for habeas relief fails.

Ground II: Prosecutorial misconduct

Petitioner alleges in Ground II that the prosecutor's extensive questioning during jury selection played upon the emotions and prejudices of the jurors in regard to their personal experiences with murder and drugs. The OCCA found the prosecutor's questions were appropriate and "did not cross any due process or fairness lines by asking potential jurors about their emotional experiences with drugs and murder and whether they could put those aside." *Williams,* slip op. at 10.

In examining habeas claims of prosecutorial misconduct, "it 'is not enough that the prosecutor['s] remarks were undesirable or even universally condemned.'" *Darden v. Wainwright,* 477 U.S. 168, 181 (1986) (quoting *Darden v. Wainwright*, 699 F.2d 1031, 1036 (11th Cir. 1983)). Instead, "[t]he relevant question is whether the prosecutor['s] comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974)). After a careful review of the record, the court finds the decision by the OCCA was not contrary to or an unreasonable application of federal law, and its decision was not based on an unreasonable determination of the facts. This ground for habeas relief fails.

Ground III: Book-in Photograph

Petitioner next complains that admission of a book-in photo from the Tulsa County Jail was prejudicial, because it obviously was a police book-in photo and showed his tattoos.

The photo was taken when petitioner was arrested, but "that point was not made entirely clear to jurors." *Williams,* slip op. at 11. The OCCA analyzed the claim and denied relief:

> The State claims the photo was relevant because it showed [petitioner] weighed eighty pounds less at the time of the crime. The State also claims the photo was relevant

because the murder weapon was found in a pair of blue jeans, which could have been [petitioner's], at a time when he was much lighter. It seems the argument, then, is that the book-in photo was useful circumstantial evidence to establish [petitioner] could have had possession of the gun.

However, we find little, if any, relevancy in the photograph's admission. The blue jeans themselves were not admitted as an exhibit. Instead, we have only a photograph of the jeans, wadded up with the gun sticking out of them. The book-in photograph does not tend to make it more or less probable that the blue jeans were [petitioner's] or that he possessed the gun, for we cannot even determine the size of those jeans. . . . [T]he photograph was not relevant, . . . [h]owever, due to the circumstances shown below, we find the photo's admission was harmless.

A bench conference was had on the admissibility of the photograph prior to the time it was identified at trial. There, defense counsel argued the photo was not relevant to the issue of whether [petitioner] was "skinny enough to fit in the pants that were discovered in the car. The officer can testify to that." Defense counsel also claimed the photo was prejudicial because it displayed [petitioner] in a police setting and showed his tattoos. The trial court, however, ruled the photograph admissible without comment.

Later, when the photograph was shown to a police officer for purpose of showing what [petitioner] looked like at the time he was stopped, defense counsel did not preserve his objection. As the trial progressed, the State really made no attempt to make a connection between [petitioner's] increased weight and the size of the jeans. When the book-in photo was actually offered for admission, defense counsel did not object but merely asked to look at the photo one last time. (Tr. II at 360). He then stated he had "no objections" (although that may have been in reference to other exhibits). Under these circumstances, we review for plain error only.

While the photograph had little or no relevance to any fact of consequence, it also held little, if any, prejudicial impact. The photo shows [petitioner] as he appeared on the day of his arrest (June 11, 1997), wearing shorts, a tank top shirt, and sandals. He is standing before a board that measures his height and several of his tattoos are noticeable. It is clear he is at the police department, but that is hardly a revelation.

Plain errors go to the foundation of the case. *Simpson v. State,* 876 P.2d 690, 695 (Okla. Crim. App. 1994). Here, we see only a picture of [petitioner] as he looked on the day of the crime. It hardly can be said that [petitioner] was prejudiced because jurors saw him as he would normally appear. The admission of this photo is error, but it did not

> take away a right essential to the defense. Its admission was harmless.

Williams, slip op. at 11-13 (footnote omitted).

"State court rulings on the admissibility of evidence may not be questioned in federal habeas proceedings unless they render the trial so fundamentally unfair as to constitute a denial of federal constitutional rights." *Brinlee v. Crisp,* 608 F.2d 839, 850 (10th Cir. 1979), (citing *Gillihan v. Rodriguez,* 551 F.2d 1182, 1192-93 (10th Cir.)), *cert. denied,* 444 U.S. 1047 (1980). Here, the court finds the admission of the photograph did not result in a fundamentally unfair trial, and the Court of Criminal Appeals' determination of this issue was consistent with federal law. This ground for habeas relief is meritless.

Ground IV: Ineffective assistance of trial counsel

Petitioner asserts in Ground IV that his trial counsel was ineffective in failing (1) to request the trial court to properly instruct the jury on accomplice testimony, (2) to object to prosecutorial misconduct during *voir dire*, (3) to renew the objection to the State's book-in photograph, and (4) to carry through with a hearing on petitioner's motion for a new trial. "There is a strong presumption that counsel provided effective assistance of counsel and petitioner has the burden of proof to overcome that presumption." *United States v. Rantz*, 862 F.2d 808, 810 (10th Cir. 1988) (citing *United States v. Cronic*, 466 U.S. 648,

658 (1984)), *cert. denied,* 489 U.S. 1089 (1989). In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court set forth the two-part test for determining the validity of a habeas petitioner's claim of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

The OCCA found, and this court agrees, "there was no prosecutorial misconduct, and [petitioner] was not prejudiced by trial counsel's failure to request an accomplice as a matter of law instruction with respect to Pearce or failure to renew his request that the book-in photo be excluded from trial." *Williams,* slip op. at 13. The appellate court further found there was "no reasonable probability that, but for these unprofessional errors, the result of the proceeding would have been different." *Id.* (citing *Strickland*, 446 U.S. at 698) (footnote omitted). The Court of Criminal Appeals' conclusion was not contrary to or an unreasonable application of federal law, and the decision

was not based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d).

With respect to petitioner's claim that trial counsel abandoned him while his motion for a new trial was pending, the OCCA found the circumstances surrounding the motion and trial counsel's withdrawal were not clearly set forth in the record. *Id.* at 14. The appellate analyzed this claim and a related issue as follows:

> . . . It appears [petitioner's] trial counsel, Fred M. Schraeder, announced at the December 1998 sentencing hearing that he would be representing [petitioner] on appeal. On December 14, 1998, Schraeder filed a notice of intent to appeal. Schraeder later filed a Petition in Error on [petitioner's] behalf on March 15, 1999. (That filing was untimely, however, and the appeal was dismissed by this Court, causing [petitioner] to go through the process of seeking an appeal out of time *pro se*.)
>
> On March 24, 1999, Wesley Montgomery, a DOC prisoner and former cellmate of co-defendant Stacy Pearce gave a handwritten affidavit claiming Pearce told him he committed a murder and someone else had been blamed for it. Schraeder attached that affidavit to a motion for a new trial filed May 26, 1999.
>
> A July 2, 1999, court minute indicates the hearing on the motion for new trial was passed until August 3, 1999. The record

suggests no hearing was ever held on the motion. Attorney Schraeder filed a motion to withdraw from the case on August 6, 1999, mailing the same to the district attorney's office the prior day, along with a proposed order. His motion was granted three days later.

Accordingly, this Court ordered the matter to be addressed in an evidentiary hearing, along with other non-record matters raised in [petitioner's] application to supplement the appellate record, or, alternatively, to hold an evidentiary hearing on ineffective assistance of counsel claims, filed pursuant to Rule 3.11(B)(3)(a) & (b), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (1999). The evidentiary hearing was held on April 30, 2002, before the Honorable Charles M. Humphrey, District Judge.

Judge Humphrey found Schraeder failed to present the Motion for New Trial to the Court because he had not been fully paid, because he was moving, and because he was curtailing his active criminal law practice at the time. Judge Humphrey noted that Shraeder had testified that he orally advised his client of his withdrawal from the case "which included his representation at the Motion for New Trial." However, Judge Humphrey found there was no written documentation to support Shraeder's claim and that Schraeder had violated a District Court Rule by not sending a copy of his

Application to Withdraw or the Order Allowing Withdrawal to [petitioner] by certified mail.

Regarding the merits of the motion for new trial, Judge Humphrey found Wesley Montgomery is a four-time convicted felon, that there was no independent corroboration of his statement, no specific details given by Pearce to Montgomery, and no mention of [petitioner]. Judge Humphrey found he would not have granted [petitioner] a new trial on the basis of Montgomery's statement alone.

While the circumstances regarding Schraeder's representation of [petitioner] following trial and his withdrawal from the case are certainly questionable, we cannot say [petitioner] was prejudiced thereby. [Petitioner] was able to have his appeal reinstated following Shraeder's blunder, and [petitioner] was appointed replacement counsel for post-trial purposes. Furthermore, the motion for new trial was based entirely on the word of one jailhouse snitch who allegedly heard unspecific hearsay that did not name [petitioner]. We agree that this lone statement would not have entitled [petitioner] to a new trial.

. . . Shraeder's actions with respect to the motion for new trial and withdrawal from the case, while deficient, did not prejudice [petitioner] to such an extent that

> would cause his assistance to be considered constitutionally ineffective.

Williams, slip op. at 14-16 (footnotes omitted).

This court finds the Court of Criminal Appeals' determination of this issue was in accordance with federal constitutional law. Petitioner was not prejudiced by counsel's alleged ineffectiveness, because a new trial would not have been granted, and petitioner was appointed appellate counsel and allowed to pursue his direct appeal. *See Strickland*, 466 U.S. at 687.

The OCCA also addressed petitioner's claim that his trial counsel pressured him into proceeding to trial, rather than accepting a plea offer:

> One other matter [ ] was raised in the application for evidentiary hearing (and extensively addressed at that hearing) and gives us greater concern. [Petitioner] claims his trial counsel refused to represent [petitioner] if he accepted the State's plea offer and entered a guilty plea. [Petitioner] claims the State offered [petitioner] a ten (10) year sentence in exchange for a guilty plea to the charge of Manslaughter. He further claims he expressed a desire to accept this plea agreement, but Mr. Shraeder threatened to withdraw from the case if [petitioner] pled guilty on the basis that Shraeder would not have a defendant enter a guilty plea to a crime he maintained he did not commit . . .
>
> During the evidentiary hearing, Shraeder testified [petitioner] was offered a ten-year

sentence in exchange for a plea of guilty to murder (not manslaughter), an offer conveyed to [petitioner] "several times." Shraeder also admitted [petitioner] wanted to take the deal, but Shraeder advised him as follows:

> if he maintained his innocence to me that if he were to, in fact, plead guilty to something that he did not do, that would constitute perjury and I would be suborning perjury and I was not prepared to, based upon what he told me had happened regarding the night of the killing, stand next to him when he perjured himself. . . . The decision to go to trial was entirely his, up to and including the day before and during trial the decision was his. His other option was if he wanted to enter a plea, he was going to have to find someone else to represent him. . . .

Shraeder could not recall if there were ever any discussions with [petitioner] or the district attorney about the possibilities of an *Alford* plea or a no-contest plea, although he thought there probably were. He believed the district attorney's office required a guilty plea and testimony against co-defendant Stacy Pearce.

Clifford J. Smith, then the assistant district attorney handling the prosecution of [petitioner's] murder case, testified the case was difficult, one that could go either way

based upon the strength of testimony of dubious witnesses. He personally came to the conclusion that [petitioner] was the shooter and proceeded in that fashion. However, due to the lack of evidence, he made an offer on the eve of trial for a ten-year sentence in exchange for a guilty plea to murder, not manslaughter. He would not consider an *Alford* or no-contest plea because it might compromise his case against Pearce and Debra Smith.

> Smith could not remember how long the offer was on the table, . . . [b]ut once trial began, it was no longer available. Smith recalled talking to Schraeder at one point and being told [petitioner] maintained his innocence and therefore rejected the offer. . . .
>
> [Petitioner] testified the offer was communicated to him on the day before trial (he thought it was ten years for a plea of guilty to manslaughter). On this day, Shraeder told him if he wanted to take the deal, he would have to retain another attorney to represent him. [Petitioner] testified he felt pressured by this statement and counsel's statement that he would soon be going home. [Petitioner] testified that he agreed to plead guilty, although he was factually innocent.

[Petitioner's] sister testified she heard this or a similar conversation, although the date was not specified in her testimony. . . . [Petitioner's] wife Diane Williams claimed she heard a similar conversation that occurred during a "break" in the trial, whereby Shraeder was saying he would not stand with [petitioner] at trial if he took the ten-year deal. . . .

Upon hearing all of the evidence at the evidentiary hearing, Judge Humphrey ruled, "Clearly, Shraeder's action in advising his client that he would withdraw from his representation if he entered a guilty plea was highly improper." We agree wholeheartedly with this finding.

However, "[b]ased upon the testimony of Mrs. Williams and the attorney's refusal to testify directly on this point," Judge Humphrey also found Shraeder's improper advice "came after the trial had commenced, and the State's plea bargain had been withdrawn. Therefore, Williams (sic) decision to go to trial was not influenced by the actions of his trial attorney."

We find Judge Humphrey's second conclusion is not fairly supported by the evidentiary hearing

> record. Shraeder admitted communicating the plea offer to [petitioner] "several" times and that [petitioner] wanted to take the deal, but opted to proceed to trial when told he would have to get a new attorney. All indications are that these conversations took place before "proceeding" to trial.
>
> . . . Schraeder's answer [to Judge Humphrey's inquiry as to whether petitioner wanted to take the deal before the trial began] was evasive . . . and suggests that [petitioner] was made aware, before trial, that he would have to get a new attorney if he wanted to take the plea. Furthermore, Schraeder's August 1, 2000, letter to the Oklahoma Bar Association, in response to the grievance filed by [petitioner's] sister, clearly indicates that these events happened before [petitioner] proceeded to trial.

Williams, slip op. at 16-21 (footnotes omitted).

> We therefore conclude, based upon the entirety of this record, that Shraeder's statements to [petitioner] concerning his withdrawal upon a plea of guilty, occurred before trial, at a time when the plea offer was available.

Id. at 22.

> We find Schraeder's ultimatum to [petitioner] concerning the guilty plea – that he would have to obtain new counsel if he desired to accept the ten year deal – amounted to deficient performance under *Strickland*. The matter of prejudice is more difficult, however, for there is no way of determining if a factual basis for the plea would have been established or if the trial judge would have accepted the plea.

Id. at 23.

> [T]rial counsel's actions placed [petitioner] in the position of finding another attorney on the eve of trial, paying that attorney with money he did not have (his family having already paid $30,000), and staying in jail until these events could happen, if he wanted to take the ten year deal. Otherwise, he could go to trial and take his chances. The lost opportunity to pursue that plea offer with his retained counsel leads us to conclude [petitioner] has indeed suffered prejudice by his trial counsel's action, for we have no way of reinstating that plea offer, even by reversing this case and remanding it for a new trial.
>
> These unique facts require this Court to modify [petitioner's] sentence. Having considered many possibilities, we find [petitioner's] sentence should be modified to life imprisonment with the possibility of parole.

Id. at 24-25.

After careful review, the court agrees with the conclusions by the Court of Criminal Appeals with respect to petitioner's claim about the plea offer. Upon finding that trial counsel was ineffective, and petitioner was prejudiced by that ineffectiveness, petitioner's sentence was modified from life without the possibility of parole to life with the possibility of parole. *Id.* at 25.[2] Sentencing is a matter of state law, *see Shafer v. Stratton*, 906 F.2d 506, 510 (10th Cir.), *cert. denied*, 498 U.S. 961 (1990), and petitioner's modified sentence is within the statutory sentencing range for his crime, *see* Okla. Stat. tit. 21, § 701.9. The Court of Criminal Appeals' resolution, therefore, was not unconstitutional, and does not warrant federal habeas corpus relief. *See United States v. O'Driscoll*, 761 F.2d 589, 599 (10th Cir. 1985), *cert. denied*, 475 U.S. 1020 (1986). *See also Gaines v. Hess*, 662 F.2d 1364, 1370 (10th Cir. 1981).

Ground V: Cumulative error

Finally, petitioner alleges cumulative error supports reversal of his conviction or modification of his sentence. The respondent asserts there were no errors at trial that merit relief, so there was no accumulation of error. The Court of Criminal Appeals

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[2] Petitioner does not allege the sentence modification by the Court of Criminal Appeals constituted a denial of his constitutional rights. Even if he were asserting this claim, it has not been exhausted, as required by 28 U.S.C. § 2254(b).

found this issue did not warrant relief and did not discuss the claim. *Williams,* slip op. at 25.

The OCCA found harmless error in the failure to instruct that Pearce was an accomplice as a matter of law, because of overwhelming evidence of petitioner's guilt. *Id.* at 9. The Court of Criminal Appeals also found the admission of petitioner's book-in photo was harmless, because it merely showed jurors how he normally appeared. *Id.* at 13. The third alleged error regarding the plea offer was found to be prejudicial to petitioner, but the OCCA fashioned a remedy to cure it. *Id.* at 24-25.

> A cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless. Unless an aggregate harmless determination can be made, collective error will mandate reversal, just as surely as will individual error that cannot be considered harmless.

Darks v. Mullin, 327 F.3d 1001, 1018 (10th Cir.) (quoting *United States v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990)), *cert. denied*, 540 U.S. 968 (2003).

Here, the court finds the sum of the harmless errors did not render petitioner's trial unconstitutional. "No reasonable probability exists that the jury would have acquitted [petitioner] absent the errors." *Darks,*

327 F.3d at 1019 (quoting *Hooper v. Mullin*, 314 F.3d 1162, 1178 (10th Cir. 2000)). Therefore, habeas corpus relief cannot be granted.

ACCORDINGLY, the Magistrate Judge recommends that this action be, in all respects, dismissed.

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Local Rule 72.1(C), the parties are given ten (10) days from being served with a copy of these findings and recommendations to file with the Clerk of the Court any objections with supporting briefs. Failure to file timely written objections to the Magistrate Judge's recommendations may result in waiver of appellate review of factual and legal questions. *Talley v. Hesse*, 91 F.3d 1411, 1412-13 (10th Cir. 1996); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 31st day of July 2006.

/s/ Kimberly E. West
KIMBERLY E. WEST
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

MICHAEL JOE WILLIAMS,	)	
Petitioner,	)	
v.	)	**Case No. CIV-03-201-RAW**
JUSTIN JONES,	)	
Respondent.	)	

ORDER

(Filed Sep. 14, 2006)

On July 31, 2006, Magistrate Judge West filed a Report and Recommendation, recommending that this action (commenced by petitioner's filing of a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254) be dismissed because petitioner did not demonstrate relief was warranted. Petitioner has timely filed an objection. The Court has conducted the de novo review required by 28 U.S.C. §636(b) of "those portions of the report or specified findings or recommendations to which objection is made." Upon review, the recommendation of the Magistrate Judge will be followed.

It is the Order of the Court that the Report and Recommendation of the United States Magistrate Judge is hereby adopted and affirmed as the Order of the Court. Petitioner's petition pursuant to 28 U.S.C. §2254 is hereby DISMISSED.

Dated this 14 September 2006.

/s/ Ronald A. White
Ronald A. White
United States District Judge
Eastern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

MICHAEL JOE WILLIAMS,	)	
Petitioner,	)	
	)	
v.	)	**Case No. CIV-03-201-RAW**
JUSTIN JONES,	)	
	)	
Respondent.	)	

JUDGMENT

(Filed Sep. 14, 2006)

Pursuant to the Order contemporaneously entered, the Court hereby enters this Judgment pursuant to Rule 58 F.R.Cv.P. dismissing this action.

Dated this 14 September 2006.

/s/ Ronald A. White
Ronald A. White
United States District Judge
Eastern District of Oklahoma

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL JO WILLIAMS,	)	
Appellant,	)	**NOT FOR PUBLICATION**
v.	)	
THE STATE OF OKLAHOMA,	)	**Case No. F-2000-1247**
Appellee.	)	

OPINION

(Filed Feb. 18, 2003)

LUMPKIN, JUDGE:

Appellant Michael Joe Williams was tried by jury in Okmulgee County District Court, case number CRF-1997-188, and convicted of First Degree Malice Aforethought Murder, in violation of 21 O.S.Supp.1996, § 701.7(A). The jury set punishment at life imprisonment without the possibility of parole, and the trial judge sentenced Appellant accordingly. Appellant now appeals his conviction and sentence.

In the early morning hours of June 9, 1997, someone entered Larry Durrett's Okmulgee trailer home and fired three shots at Durrett and his wife Delores while they were in bed asleep. Durrett jumped out of bed and pursued the assailant. Delores heard two more shots, someone leaving the trailer, and a car starting. She went and found her husband

standing in the doorway, bleeding from the chest. She ran to the neighbors to call for an ambulance.

Larry Durrett died later at the hospital. The State Medical Examiner testified he had received five gunshot wounds. The cause of death was gunshot wounds to the chest and abdomen. Five bullet casings were found inside the Durrett home by police investigators.

The next day, the Glenpool police pulled over Debra Smith, due to her erratic driving. Appellant was the front seat passenger. An officer became suspicious when Appellant disobeyed orders to stay by the car and attempted to walk behind the officer. Appellant was handcuffed for the officer's safety.

Smith's driver's license was suspended, and she was arrested on that basis. Appellant could not drive, for his license was also suspended, and so the car was impounded. During a license check, the arresting officer learned Appellant was wanted for questioning in regard to an Okmulgee homicide.

During the car's inventory, officer's found a .22 rifle behind the driver's seat, inside a pair of blue jeans. Officers also found a wallet and identification belonging to Stacy Pearce, drug paraphernalia, suitcases packed with male and female clothing, and a newspaper with a story about Durrett's shooting.

A District Attorney's investigator learned the Glenpool police had Appellant and Debra Smith in custody and went to interview them. Upon seeing the

items inventoried from the car, he obtained a search warrant.

A firearm's expert found the casings from Durrett's home matched the rifle found in Debra Smith's car. The rifle belonged to Stacy Pearce's mother.

William Ledford, a friend of the deceased, testified that Appellant came to his home prior to these incidents asking for Larry Durrett in regard to some red phosphorus for making "dope." Ledford also claimed he helped Appellant locate Durrett on the day before the murder. Ledford heard Appellant ask about a .22 caliber gun. Upon finding Durrett, Ledford overheard Durrett say to Appellant, "I heard you was going to shoot me in the back of the head."

Melinda Noies testified that Appellant told her Durrett owed him chemicals from a drug deal and that he intended to kill Durrett. Robert Frost, a district attorney's investigator, heard similar statements. Appellant called Frost in May of 1997, seeking to become an informant against Larry Durrett. Appellant said he wanted to set Durrett up or kill him.

When interviewed, Appellant claimed Durrett had not held up his end of a drug deal and so he went looking for Durett on June 8, 1997, accompanied by Bill Ledford and Debra Smith. They met Durrett, who agreed to settle up with them the next day. That evening, Stacy Pearce and Appellant met for the purpose of doing crank. They returned to Appellant's

parents house at some point that night and discussed going to Kansas to look for a job. Appellant heard from Pearce and Smith two days later. They came and picked Appellant up in Tulsa. Appellant was in Pearce's car and transferred two bags from that car into the car that he and Debra Smith were driving when stopped.

Debra Smith was Larry Durrett's former girlfriend and testified she had an ongoing relationship with him until the day he died. Smith also dated Appellant during the same time. Smith claimed Appellant was jealous about her relationship with Durrett and had threatened to kill them both.

Smith confirmed the story about Durrett not keeping his end of a drug deal with Appellant and Stacy Pearce; Appellant believed Durrett had short-changed him. Smith testified Appellant had been irate and looking for Durrett for some time, until Bill Ledford led Appellant to Durrett the day before Durrett was murdered. Smith heard Durrett ask Appellant if he had said he would cut off Durrett's head. Appellant said he had not.

Smith testified that on the evening of June 8, 1997, Appellant and Pearce discussed going to Hanna for a drug deal and then, after meeting up with Tony Boswell, discussed meeting "Roley" in Hanna. Appellant and Pearce left at about 10 p.m. and returned about 3:00 a.m. Smith overheard Appellant and Pearce discussing how Durrett and Boswell had "screwed" them over on the drug deal. Appellant

again threatened to kill Durrett. Appellant and Pearce left, and Smith did not hear from them again until the next afternoon, when Appellant called her from Tulsa and asked her to come pick him up.

During their phone conversation, Smith claimed Appellant was talking erratically and said she didn't have to be scared anymore. When she asked Appellant to explain what he meant, Appellant said, "Well, you don't have to worry about him anymore." She was eventually able to get Appellant to admit he was speaking of either Durrett or a man named Carl Brock.

Smith packed an overnight bag and drove to Tulsa to pick up Appellant. They met at an apartment alone. Appellant was "real antsy." He wanted to watch the news and obtain a newspaper, but would not give Smith any details about what was going on. They got into Smith's car and Appellant fell asleep.

Smith drove to Chubby Shaver's house. Shaver then told Smith he had heard a rumor that Larry Durrett had been shot and killed. Smith claims she got hysterical and "fell apart." When the rumor was confirmed, she went to her car and told Appellant what had happened. Appellant got angry with Smith and told her to settle down. According to Smith, Appellant then informed her he had shot Durrett. He then dropped Smith off at a friend's apartment.

The next day, June 10, Smith claims she met Appellant and Stacy Pearce at the apartment. When she attempted to leave, Appellant grabbed and

threatened her, saying she was "neck deep in this." Appellant left her with Pearce and took off in Pearce's car. He returned that afternoon and handed Smith a newspaper story about Durrett's murder. Appellant brought the gun and clothes for he and Pearce. Later that evening, after Pearce had left, Appellant began slapping Smith around while she was taking him to Tulsa to drop him off and then go home. She was then pulled over by the Glenpool police, arrested, and charged as an accessory after the fact on the murder.

Stacy Pearce, a co-defendant to the crime of First Degree Murder in this case, testified without any promises or agreements with the D.A.'s office concerning leniency. He and Appellant had been friends since high school and had agreed to try to make some money off methamphetamine, with Pearce helping to gather the materials. Debra Smith was also involved and had procured Larry Durrett to manufacture the drugs. But Smith landed in jail, and so Appellant wanted to raise money to get her out of jail.

Pearce claimed he, Appellant, and Durrett agreed that Durrett would make the drugs, they would use the money to get Smith out of jail, and split what was left three ways. But Durrett took the chemicals and left. Pearce claimed Appellant was upset by Durrett's actions and said he would kill him.

According to Pearce, he and Appellant eventually hooked up with Tony Boswell, who had plans to manufacture drugs in Hanna. Appellant, Boswell, and Pearce traveled to Hanna. Pearce brought a .22

caliber rifle because he felt things were not right. Upon arriving, the trio was confronted by a group of people and wound up pouring the chemicals out on the ground. Appellant believed Durrett was behind the incident and that Boswell was involved as well. The trio argued in the car about what Boswell knew and whether Durrett was involved. Appellant put the gun to Boswell's head at one point.

Pearce and Appellant then went to Debra Smith's Henryetta apartment, but left again together around 2:30 a.m. They went to Okmulgee, and Appellant told Pearce he wanted to go talk to Durrett. Pearce then drove Appellant to Durrett's trailer. Pearce claimed Appellant took out the gun and stepped out of the car. Pearce believed Appellant intended to go kill Durrett.

Not long afterward, Appellant opened the car door and said, "Let's get the fuck out of here." As they left, Appellant told Pearce he had shot Durrett. They drove to the home of Appellant's parents.

Appellant's mother testified she heard Appellant on the telephone at her home at 2:30 a.m. on the morning Larry Durrett was killed. She also testified that her husband got up at 5:30 a.m. and found Appellant and Pearce drinking coffee at the table. However, her husband had apparently given a statement indicating the time was 3:45 a.m.

In proposition one, Appellant claims Debra Smith and Stacy Pearce were both accomplices to the crime of first-degree murder. He claims Pearce was an accomplice as a matter of law, and Smith's complicity

was a fact question for the jury. Appellant thus claims he was prejudiced by the trial court's failure to instruct the jury, *sua sponte*, that accomplice testimony requires corroboration. He admits his trial counsel did not request such an instruction. We review for plain error. *Simpson v. State*, 876 P.2d 690, 693 (Okl.Cr.1994).

A conviction cannot be had upon the testimony of an accomplice unless that accomplice "be corroborated by such other evidence as tends to connect the defendant with the commission of the offense. . . ." 22 O.S.2001, § 742. Thus, the general rule used by this Court is that accomplice testimony must be corroborated with evidence that, standing alone, tends to link the defendant to the commission of the crime charged. *Wackerly v. State*, 12 P.3d 1, 10-11 (Okl.Cr.2000). There must be at least one material fact of independent evidence that tends to connect the defendant with the commission of the crime. *Id.* The evidence may be direct or circumstantial and need not corroborate all of the material aspects of the crime. *Id.* Where accomplice testimony is corroborated by at least one material fact of independent evidence that tends to connect a defendant with the crime charged, the jury can then infer the accomplice testimony was truthful. *Spears v. State*, 900 P.2d 431, 440 (Okl.Cr.1995).

The test established by this Court to be used in the evaluation of whether a witness is an accomplice is very simple: the witness is an accomplice if "he could be indicted for the offense for which the accused

is on trial." *Bowie v. State*, 906 P.2d 759, 763 (Okl.Cr.1995); *Gray v. State*, 585 P.2d 357, 359 (Okl.Cr.1978). However, if evidence is susceptible to alternative findings that the witness is or is not an accomplice, then the issue is a question of fact to be submitted to the jury under proper instruction. *Bryson v. State*, 876 P.2d 240 256 (Okl.Cr.1994). When there is no evidence of complicity in the record, this Court may declare the witness is not an accomplice, thus negating the statutory prerequisite for corroboration. *Bowie*, 906 P.2d at 763.

We agree Pearce is an accomplice as a matter of law. The State essentially confesses this point.

Regarding Smith, however, Appellant claims her complicity was a fact question for the jury. The State argues she was not an accomplice at all, for there was no evidence she participated in, encouraged, or could be indicted for the murder. (Smith was indicted for accessory after the fact, not murder.)

Appellant points to the following facts to support his claim that Smith's complicity was a fact question for the jury: at the time Durrett was killed, Smith had a continuing relationship with both Appellant and Durrett, suggesting the possibility of a domestic conflict and "conflicting loyalties" (indeed, Smith testified Appellant and Durrett were extremely jealous of each other, to the point that Appellant had threaten to kill Smith and Durrett); Smith found out on the day before the murder that Durrett was not divorced from his wife, as Smith previously thought;

Smith assisted Appellant in locating Durrett on the day before the murder regarding a drug deal gone bad; the drug deal had, supposedly, been intended to raise money to get Smith out of jail, but Durrett had not followed through with it, shortchanged Appellant, and left Smith in jail; Smith had seen Pearce with a .22 rifle on the night of the murder; Smith admitted lying to police officers about Appellant being with her all night on the night of the murder, after Appellant told Smith that she was "neck deep in it"; Smith was in her car with Appellant when stopped by the Glenpool police; the murder weapon was found in her car, behind the driver's seat; Smith was driving the car; and a suitcase with women's clothing was also found in the car.

While these facts certain give rise to serious suspicions, they do not provide enough evidence to actually indict/charge Smith as an alder and abettor to the crime of murder.[1] There is no real evidence that Smith participated in, planned, or encouraged the murder, only possibilities based upon circumstantial evidence. *See Spears*, 900 P.2d 440 ("Where there is no evidence that a witness participated in, planned, or encouraged the commission of a crime, their mere

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[1] We realize an indictment/information is merely an unproven accusation. However, for purposes here, we must look at the proof behind those allegations that would lead a prosecutor to reasonably belief he or she will be able to present sufficient evidence at the preliminary hearing to establish probable cause that the defendant committed the charged crime.

presence during its commission will not make them an accomplice.") Thus, we find there was no error, and thus no plain error, in failing to give an accomplice instruction in regard to Smith's testimony.

Consequently, although we find plain error in failing to give an accomplice as a matter of law instruction with respect to Pearce's testimony, we find that error was harmless. *See Cummings v. State*, 968 P.2d 821, 831 (Okl.Cr.1998) ("where there is overwhelming evidence of guilt and the presence of sufficient corroborating testimony, the failure to so instruct is harmless."); *Howell v. State*, 882 P.2d 1086, 1092 (Okl.Cr.1994); *Bryson v. State*, 876 P.2d 240, 256 (Okl.Cr.1994). Furthermore, because Smith cannot be considered an accomplice to the crime, a juror could infer her testimony was truthful without corroboration, and her testimony could then be used to corroborate Pearce's testimony. *Cummings*, 968 P.2d at 831. In so doing, we find overwhelming evidence of guilt with respect to Appellant, and the failure to give the appropriate accomplice instruction with respect to Pearce was harmless.[2]

In proposition two, Appellant claims he was prejudiced by the prosecutor's "improprieties" during

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[2] We reject Appellant's accomplice argument concerning uncharged conspiracy to manufacture and sell drugs between Appellant, Pearce, and Smith that would somehow require corroboration with respect to Smith's testimony about the drug deal gone bad with Durrett, especially when considering Appellant's own statements to police about that matter.

jury selection, i.e., the "repeated use of questions and comments during *voir dire* to arouse the jurors' emotions and unfairly prejudice jurors against" him. He claims the prosecutor took advantage of emotionally-charged topics, like family members of veniremen who had been murdered or involved with methamphetamine. He claims trial counsel was ineffective for not objecting to these instances. (See Proposition IV.)

Having reviewed each of the comments outlined in Appellant's brief, however, we find no error was committed. Jurors come to a jury panel with a variety of experiences, both good and bad. We find the prosecutor did not cross any due process or fairness lines by asking potential jurors about their emotional experiences with drugs and murder and whether they could put those aside. The prosecutor's questions here were appropriate.

In proposition three, Appellant claims he was prejudiced by the improper admission of a jail book-in photograph. He claims the photograph fails to meet the three-prong balancing test set out in *Ingram v. State*, 755 P.2d 120, 121-23 (Okl.Cr.1988). He further claims the photograph was more prejudicial than probative, thereby, entitling him to a new trial or modification of his sentence.

Ingram is distinguishable from the present case. There, the Court was concerned with the admission of mug shot photographs of the defendants that witnesses had used to identify the defendant from a

photographic lineup. The photos clearly implied the defendant had been involved in prior crimes.

Here, however, the photograph was a book-in photograph taken at the time of Appellant's arrest (although that point was not made entirely clear to jurors). The photograph was not used in photo lineup for witnesses to pick out the perpetrator of a crime, still on the loose, as in *Ingram*. The balancing test in *Ingram* was specifically made applicable to a mug shot used to prove identity in that context, and this is simply not the situation we have here.

Nevertheless, we must still ask whether the photo was relevant, and, if so, whether its probative value was substantially outweighed by the danger of unfair prejudice to the accused. 12 O.S.2001, §§ 2401 & 2403.

The State claims the photo was relevant because it showed Appellant weighed eighty pounds less at the time of the crime. The State also claims the photo was relevant because the murder weapon was found in a pair of blue jeans, which could have been Appellant's, at a time when he was much lighter. It seems the argument, then, is that the book-in photo was useful circumstantial evidence to establish Appellant could have had possession of the gun.

However, we find little, if any, relevancy in the photograph's admission. The blue jeans themselves were not admitted as an exhibit. Instead, we have only a photograph of the jeans, wadded up with the gun sticking out of them. The book-in photograph

does not tend to make it more or less probable that the blue jeans were Appellant's or that he possessed the gun, for we cannot even determine the size of those jeans. Because the photograph was not relevant, we do not even need to apply the balancing test of section 2403. However, due to the circumstances shown below, we find the photo's admission was harmless.

A bench conference was had on the admissibility of the photograph prior to the time it was identified at trial. There, defense counsel argued the photo was not relevant to the issue of whether Appellant was "skinny enough to fit in the pants that were discovered in the car. The officer can testify to that." Defense counsel also claimed the photo was prejudicial because it displayed Appellant in a police setting and showed his tattoos. The trial court, however, ruled the photograph admissible without comment.

Later, when the photograph was shown to a police officer for purpose of showing what Appellant looked like at the time he was stopped, defense counsel did not preserve his objection. As the trial progressed, the State really made no attempt to make a connection between Appellant's increased weight and the size of the jeans.[3] When the book-in photo was actually offered for admission, defense counsel

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[3] One witness testified he could not tell the size of the men's clothing found in the car.

did not object but merely asked to look at the photo one last time. (Tr. III at 360.) He then stated he had "no objections" (although that may have been in reference to other exhibits.) Under these circumstances, we review for plain error only.

While the photograph had little or no relevance to any fact of consequence, it also held little, if any, prejudicial impact. The photo shows Appellant as he appeared on the day of his arrest (June 11, 1997), wearing shorts, a tank top shirt, and sandals. He is standing before a board that measures his height and several of his tattoos are noticeable. It is clear he is at the police department, but that is hardly a revelation.

Plain errors go to the foundation of the case. *Simpson*, 876 P.2d at 695. Here, we see only a picture of Appellant as he looked on the day of the crime. It can hardly be said that Appellant was prejudiced because jurors saw him as he would normally appear. The admission of this photo is error, but it did not take away a right essential to the defense. Its admission was harmless.

In proposition four, Appellant claims he was denied his right to effective assistance of counsel. He first restates his previous propositions, i.e., his trial counsel failed to request critical jury instructions, failed to object to prosecutorial misconduct during *voir dire*, and failed to renew an objection to the admission of a jail book-in photo. However, we find, as we did above, there was no prosecutorial misconduct, and Appellant was not prejudiced by trial

counsel's failure to request an accomplice as a matter of law instruction with respect to Pearce or failure to renew his request that the book-in photo be excluded from trial. We find no reasonable probability that, but for these unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 2070, 80 L.Ed.2d 674 (1984).[4]

In the remainder of this proposition, Appellant raises error relating to his trial counsel's withdrawal from the case following trial and alleged failure to carry through with a hearing on Appellant's new trial motion. Appellant claims his trial counsel abandoned him while the motion for new trial was pending. He claims prejudice should be "presumed" as he was "wholly denied counsel."

The circumstances relating to the new trial motion and trial counsel's withdrawal are not clearly spelled out in the record. It appears Appellant's trial counsel, Fred M. Schraeder, announced at the December 1998 sentencing hearing that he would be representing Appellant on appeal. On December 14, 1998, Schraeder filed a notice of intent to appeal. Schraeder later filed a Petition in Error on

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[4] Here, the accomplice testimony was not the only direct evidence linking Appellant to the murder, as was the case in *Freeman v. Class*, 95 F.3d 639, 641-42 (8th Cir. 1996). Debra Smith, a non-accomplice, testified that Appellant told her he shot Durrett. We find *Freeman* is distinguishable and thus does not require this Court to find the error requires reversal.

Appellant's behalf on March 15, 1999. (That filing was untimely, however, and the appeal was dismissed by this Court, causing Appellant to go through the process of seeking an appeal out of time *pro se*.)

On March 24, 1999, Wesley Montgomery, a DOC prisoner and former cellmate of co-defendant Stacy Pearce gave a hand-written affidavit claiming Pearce told him he committed a murder and someone else had been blamed for it. Schraeder attached that affidavit to a motion for new trial filed May 26, 1999.

A July 2, 1999 court minute indicates the hearing on the motion for new trial was passed until August 3, 1999. The record suggests no hearing was ever held on the motion. Attorney Schraeder filed a motion to withdraw from the case on August 6, 1999, mailing the same to the district attorney's office the prior day, along with a proposed order. His motion was granted three days later.

Accordingly, this court ordered me matter to be addressed in an evidentiary hearing, along with other non-record matters raised in Appellant's application to supplement the appellate record or, alternatively, to hold an evidentiary hearing on ineffective assistance of counsel claims, filed pursuant to Rule 3.11(B)(3)(a) & (b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (1999). The evidentiary hearing was held on April 30, 2002 before the Honorable Charles M. Humphrey, District Judge.

Judge Humphrey found Schraeder failed to present the Motion for New Trial to the Court because he

had not been fully paid,[5] because he was moving, and because he was curtailing his active criminal law practice at the time. Judge Humphrey noted that Schraeder had testified that he orally advised his client of his withdrawal from the case "which included his representation at the Motion for New Trial." However, Judge Humphrey found there was no written documentation to support Schraeder's claim and that Schraeder had violated a District Court Rule by not sending a copy of his Application to Withdraw or the Order Allowing Withdrawal to Appellant by certified mail.

Regarding the merits of the motion for new trial, Judge Humphrey found Wesley Montgomery is a four time convicted felon, that there was no independent corroboration of his statement, no specific details given by Pearce to Montgomery, and no mention of Appellant. Judge Humphrey found he would not have granted Appellant a new trial on the basis of Montgomery's statement alone.

While the circumstances regarding Schraeder's representation of Appellant following trial and his

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[5] Judge Humphrey further found: Schraeder agreed to represent Appellant through trial for $35,000, but $5,000 was still owed at the time trial was completed; Schraeder discussed handling the appeal, but no written or oral contract was made; no additional funds paid by Appellant's family for appellate purposes; Schraeder withdrew from the case when it became apparent no further money would be paid; and the withdrawal was based upon a valid fee dispute.

withdrawal from the case are certainly questionable,[6] we cannot say Appellant was prejudiced thereby. Appellant was able to have his appeal reinstated following Schraeder's blunder, and Appellant was appointed replacement counsel for post-trial purposes. Furthermore, the motion for new trial was based entirely on the word of one jailhouse snitch who allegedly heard unspecific hearsay that did not name Appellant. We agree that this lone statement would not have entitled Appellant to a new trial.

The fee dispute is a possible matter for the Oklahoma Supreme Court and Oklahoma Bar Association, as is Mr. Schraeder's professional burnout and how it may have affected his actions concerning Appellant. Suffice it to say here, however, that Schraeder's actions with respect to the motion for new trial and withdrawal from the case, while deficient, did not prejudice Appellant to such an extent

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[6] We take notice of the fact that Attorney Schraeder was recently disciplined by the Oklahoma Supreme Court, on the complaint of the Oklahoma Bar Association, based upon Schraeder's actions in two unrelated cases occurring during the same time period as Schraeder's representation of Appellant. Both cases involved fee disputes and Schraeder's failure to account for and restore unearned fees. Both cases involved Schraeder's disregard for his clients' right to know the status of his or her case. One case involved failure to filed motions and briefs in a criminal appeal. Schraeder furnished medical proof that he suffered from occupational burnout during the time in question. He was ultimately suspended from practicing law for thirty (30) days and ordered to pay the costs of investigation.

that would cause his assistance to be considered constitutionally ineffective.

One other matter, however, was raised in the application for evidentiary hearing (and extensively addressed at that hearing) and gives us greater concern. Appellant claims his trial counsel refused to represent Appellant if he accepted the State's plea offer and entered a guilty plea. Appellant claims the State offered Appellant a ten (10) year sentence in exchange for a guilty plea to the charge of Manslaughter. He further claims he expressed a desire to accept this plea agreement, but Mr. Schraeder threatened to withdraw from the case if Appellant pled guilty on the basis that Schraeder would not have a defendant enter a guilty plea to a crime he maintained he did not commit.

To support these claims, Appellant attached to his application for evidentiary hearing a series of documents relating to a bar complaint his family filed against Schraeder concerning his representation of Appellant. Therein, a letter from Schraeder, in response to the grievance filed, states as follows:

> As to the allegation that Michael Williams was offered a ten year sentence for a plea – that is correct. Michael Williams consistently and steadfastly denied his guilt in this case. Based upon that continued denial, I advised him that if he wished to take that plea, and that plea required a guilty plea, then he would, have to retain another attorney to represent him. I would not then, or ever,

> have a defendant enter a guilty plea to an offense that he was not guilty of committing.
>
> After I told Michael Williams that he needed to retain another attorney if he desired to enter a guilty plea, we proceeded to trial.

This startling admission was the primary reason this Court ordered an evidentiary hearing to be held on matters outside the record pertaining to ineffective assistance of counsel.

During the evidentiary hearing, Schraeder testified Appellant was offered a ten-year sentence in exchange for a plea of guilty to murder (not manslaughter), an offer he conveyed to Appellant "several times". Schraeder also admitted Appellant wanted to take the deal, but Schraeder advised him as follows:

> if he maintained his innocence[7] to me that if he were to, in fact, plead guilty to something that he did not do, that would constitute perjury and I would be suborning perjury and I was not prepared to, based upon what he told me had happened regarding the night of the killing, stand next to him when he perjured himself . . . he would have had to perjure himself to get that plea done . . . it puts me in the position if, in fact, that he continues that he did not, in fact, do it, and I stand next to him and do the Lumpkin form,

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[7] Appellant apparently told Schraeder he was at the scene of the crime, but did not do the shooting and did not know it was going to take place. (E.H. at 13.)

> that, you know, makes be suborning to perjury . . . I'm not going to be a part of him perjuring himself . . . he understood that I was adamant, I'm not going to let him perjure himself, and I'm not going to be a party to it, and he elected to proceed in the manner we did . . . The decision to go to trial was entirely his, up to and including the day before and during trial the decision was his. His other option was if he wanted to enter a plea, he was going to have to find somebody else to represent him. So the decision to go to trial was his.

Schraeder could not recall if there were ever any discussions with Appellant or the district attorney about the possibilities of an *Alford* plea or a no-contest plea, although he thought there probably were. He believed the district attorney's office required a guilty plea and testimony against co-defendant Stacy Pearce.

Clifford J. Smith, then the assistant district attorney handling the prosecution of Appellant's murder case, testified the case was difficult, one that could go either way based upon the strength of testimony of dubious witnesses. He personally came to the conclusion that Appellant was the shooter and proceeded in that fashion. However, due to the lack of evidence, he made an offer on the eve of trial for a ten-year sentence in exchange for a guilty plea to

murder[8], not manslaughter. He would not consider an *Alford* or no-contest plea because it might compromise his case against Pearce and Debra Smith.

Smith could not remember how long the offer was on the table; it could have been as little as a few days or as long as a week. But once trial began, it was no longer available.[9] Smith recalled talking to Schraeder at one point and being told Appellant maintained his innocence and therefore rejected the offer.[10] The transcript strongly suggests this communication occurred at a time when the offer was still open, sometime before the trial began, for Smith testified that Schraeder understood that once trial began, there were no offers.

Appellant testified the offer was communicated to him on the day before trial (he thought it was ten years for a plea of guilty to manslaughter). On this day, Schraeder told him if he wanted to take the deal, he would have to retain another attorney to represent him.[11] Appellant claimed he felt pressured by this statement and counsel's statement that he would soon be going home. Appellant testified that he

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[8] Presumably, second degree murder.

[9] Smith believed he was approached once during the trial about whether the offer was still on the table and believed he said it was not.

[10] E.H. at 61-62.

[11] E.H. at 79, 94.

agreed to plead guilty, although he was factually innocent.

Appellant's sister testified she heard this or a similar conversation, although the date was not specified during her testimony. She recalled the offer was ten (10) years for a guilty plea to the crime of manslaughter. Appellant's wife Diane Williams claimed that she heard a similar conversation that occurred during a "break" in the trial, whereby Schraeder was saying he would not stand with Appellant at trial if he took the ten-year deal. Her testimony was somewhat suspect, as she also related, for the first time, that she overheard her husband saying Stacy Pearce was the murderer and that she had seen Appellant in her home at about 2:30 or 3:30 a.m. on the day of the murder and then at about 5:00 a.m. (The crime occurred somewhere between 4:00 a.m. and 4:30 a.m.) This testimony was in conflict with testimony given by Appellant's mother.

Upon hearing all of the evidence at the evidentiary hearing, Judge Humphrey ruled, "Clearly, Schraeder's action in advising his client that he would withdraw from his representation if he entered a guilty plea was highly improper." We agree wholeheartedly with this finding.

However, "[b]ased upon the testimony of Mrs. Williams and the attorney's refusal to testify directly on this point," Judge Humphrey also found Schraeder's improper advice "came after the trial had commenced, and the State's plea bargain had been

withdrawn. Therefore, Williams (sic) decision to go to trial was not influenced by the actions of his trial attorney."

We find Judge Humphrey's second conclusion is not fairly supported by the evidentiary hearing record. Schraeder admitted communicating the plea offer to Appellant "several" times and that Appellant wanted to take the deal, but opted to proceed to trial when told he would have to get a new attorney. All indications are that these conversations took place before "proceeding" to trial.[12]

Judge Humphrey specifically asked Schraeder if his client said I want to take the deal and get ten years before the trial began. Schraeder's answer was evasive. He said the decision to go to trial was always his clients (up to and during trial), with the understanding that if he wanted to take the plea, he would have to get another attorney. (E.H. at 49.) There was no follow-up question. However, Schraeder's answer again suggests that Appellant was made aware before trial, that he would have to get a new attorney if he wanted to take the plea. Furthermore, Schraeder's August 1, 2000 letter to the Oklahoma Bar Association, in response to the grievance filed by Appellant's sister, clearly indicates that these events happened before Appellant proceeded to trial.

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[12] Unfortunately, neither of the attorneys attempted to pin Schraeder down about when, exactly, these discussions occurred.

Clifford Smith's testimony seems to support the same conclusion. Smith testified Schraeder was aware the offer would be off the table when trial began. He further testified that the offer, which he made to Appellant on the eve of trial, was rejected via Schraeder, who said Appellant was maintaining his innocence. There would be no reason to reject an offer if Schraeder understood it was no longer available. Smith recalled an attempt was made during trial to see if the offer was still available, but the context of his testimony indicates this was a wholly separate incident than when Schraeder communicated the rejection.

Appellant specifically testified that the offer was made on the day before trial, and this was the same day Schraeder threatened to withdraw from the case if he took the deal. The testimony from Appellant's sister was inconclusive on this point, as no one ever asked her when Schraeder's statement relating to his withdrawal was made.

The only testimony supporting the trial judge's conclusion was from the least reliable witness, Appellant's wife, who simultaneously claimed for the first time that she had seen Appellant at the approximate time of the murder and that Appellant said Pearce was the murderer.

We therefore conclude, based upon the entirety of this record, that Schraeder's statements to Appellant concerning his withdrawal upon a plea of guilty,

occurred before trial, at a time when the plea offer was available.

Rule 1.2(a) of the Rules of Professional Conduct, Ok.St.Ann., Title 5, Ch.1, App. 3-A, states, in part, that "[i]n a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." This rule clearly indicates the decision to plead guilty is the client's and the attorney must abide by that decision.

However, other professional responsibility rules seem to complicate matters, insofar as the issue raised here is concerned. Subsection (c) of Rule 1.2 provides that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. . . ." Rule 1.16(a)(4) provides that a lawyer "shall withdraw from representation of a client if the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." Rule 3.3(a)(2) states that a lawyer shall not "knowingly fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal act or fraudulent act by the client."

Lying under oath is indeed a criminal or fraudulent act. But it seems to us, in the context of accepting a plea offer, a criminal defense lawyer rarely knows exactly what happened at the time of the crime, insofar as his client's actions are concerned.

The lawyer forms reasoned opinions and theories based upon the evidence, the statements of witnesses, and the defendant's own statements to counsel. But there is usually more than one way to view the evidence, as the filing of a criminal information demonstrates. Furthermore, it would be foolish to deny the fact that criminal defendants often lie to their own attorneys concerning their criminal culpability, refusing to admit their participation in the crime or their presence at the scene to the very end, even when the evidence suggests otherwise.

This is the problem with Schraeder's position. He accepted his client's confidential version of the circumstances of the crime unconditionally, although he himself was not there. Who is to say that Appellant's decision to admit guilt was not the real truth, especially when you consider the law pertaining to accomplices? Unless defense counsel personally witnessed the crime or has hard proof as to what precisely happened there, he cannot really take the position that his client is committing perjury by pleading guilty.

We find Schraeder's ultimatum to Appellant concerning the guilty plea – that he would have to obtain new counsel if he desired to accept the ten year deal – amounted to deficient performance under *Strickland*. The matter of prejudice is more difficult, however, for there is no way of determining if a factual basis for the plea would have been established or if the trial judge would have accepted the plea.

According to 22 O.S.2001, § 513, there are four types of plea: guilty; not guilty; *nolo contendere*; and a former judgment of conviction or acquittal of the offense charged. Our cases also recognize a fifth type of plea, the *Alford* plea,[13] in which a defendant pleads guilty, while maintaining his factual innocence. But the evidentiary hearing record here clearly demonstrates that the State's ten-year offer was contingent on a guilty plea, and an *Alford* plea was not available.

The problem, however, is that every plea must contain a sufficient factual basis in order to be accepted by the trial judge. *King v. State*, 553 P.2d 529, 535 (Okl.Cr.1976). Furthermore, the trial judge has the discretion to accept or reject a negotiated plea, even a guilty plea made with an adequate factual basis. *King*, 553 P.2d at 535-36; *State ex rel. Stout v. Craytor*, 753 P.2d 1365, 1368 (Okl.Cr.1988) ("There is no absolute right to have a guilty plea accepted.")

Here, although Appellant testified at the evidentiary hearing that he was willing to plead guilty even though he maintained he was factually innocent, we do not know what words he would have used in attempting to take that plea. Unless he emphatically admitted his guilt there, the trial judge

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[13] *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S.Ct. 160, 167, 27 L.Ed.2d 162 (1970).

would have been required to reject the plea.[14] Furthermore, even if guilt was admitted, the trial judge may have rejected the plea, based upon the term offered or another reason,

Nevertheless, trial counsel's actions placed Appellant in the position of finding another attorney on the eve of trial, paying that attorney with money he did not have (his family having already paid $30,000), and staying in jail until these events could happen, if he wanted to take the ten year deal. Otherwise, he could go to trial and take his chances. The lost opportunity to pursue that plea offer with his retained counsel leads us to conclude Appellant has indeed suffered prejudice by his trial counsel's action, for we have no way of reinstating that plea offer, even by reversing this case and remanding it for a new trial.

These unique facts require this Court to modify Appellant's sentence. Having considered many possibilities, we find Appellant's sentence should be modified to life imprisonment with the possibility of parole. We further find the remaining matters raised in the application for evidentiary hearing[15] and in

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[14] We recognize the Appellant and the State could have entered into a stipulation of fact of what the State's evidence would show the facts to be as a method of establishing the factual basis for the plea, but the record does not reveal that option was discussed.

[15] Appellant claims his trial counsel failed to investigate and present available evidence at trial, including a ticket Debra

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Appellant's fifth proposition, cumulative error, do not warrant further relief.

DECISION

Appellant's conviction is hereby **AFFIRMED**, but his sentence is **MODIFIED** to life imprisonment with the possibility of parole.

AN APPEAL FROM THE
DISTRICT COURT OF OKMULGEE COUNTY
THE HONORABLE CHARLES M. HUMPHREY,
DISTRICT JUDGE

APPEARANCES AT TRIAL

FRED SCHRAEDER
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DRUMWRIGHT, OK 74030
COUNSEL FOR APPELLANT

CLIFFORD SMITH
ASSISTANT DISTRICT ATTORNEY
OKMULGEE COUNTY COURTHOUSE
314 WEST SEVENTH STREET
OKMULGEE, OK 74447
COUNSEL FOR THE STATE

Smith received at 3:08 a.m. on the day of the crime and statements made by Appellant's wife. Judge Humphrey found Schraeder conducted his investigation of the case in a competent and professional matter. This ruling was not clearly erroneous.

APPEARANCES ON APPEAL

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OPINION BY: LUMPKIN, J.
JOHNSON, P.J.: CONCUR
LILE, V.P.J.: CONCUR IN RESULT
CHAPEL, J.: DISSENT
STRUBHAR, J.: CONCUR IN RESULT

RB

CHAPEL, JUDGE, DISSENTING:

Williams raises four substantive propositions of error. The majority finds merit in three of the four propositions, but denies Williams a new trial, and instead modifies his sentence from life without parole to life with the possibility of parole. Although I agree with much of the analysis in the majority opinion, I cannot agree with the remedy fashioned for the errors which occurred here. I would reverse and remand for a new trial.

United States Court of Appeals,
Tenth Circuit.
Michael Joe WILLIAMS, Petitioner-Appellant,
v.
Justin JONES, Respondent-Appellee.

No. 06-7103.

Oct. 14, 2009.

Barry A. Schwartz, Kamlet Reichert, LLP, Denver, CO, for Petitioner-Appellant.

Diane L. Slayton, Asst. Atty. General, Oklahoma City, OK, for Respondent-Appellee.

Before HENRY, Chief Judge, TACHA, KELLY, BRISCOE, LUCERO, MURPHY, HARTZ, O'BRIEN, TYMKOVICH, GORSUCH, and HOLMES, Circuit Judges.

ORDER

This matter is before the court on appellee's *Petition For Panel Or En Banc Rehearing*. We also have a supplement and a response from the appellant. In addition, we have an amicus curiae brief from multiple states. The request for panel rehearing failed to gather sufficient votes from the panel; that request is denied.

That portion of the *Petition* seeking rehearing en banc was circulated to all the judges of the court who are in regular active service. A poll was called and a majority voted to deny en banc reconsideration. The en banc request is likewise denied.

Judge Kelly concurs in the denial of en banc rehearing and writes separately. Chief Judge Henry and Judge Holmes join in that concurrence. Judge Gorsuch has filed a dissent to the denial of en banc rehearing. His dissent is joined by Judges Tacha, O'Brien and Tymkovich.

KELLY, Circuit Judge, joined by HENRY, Chief Circuit Judge, and HOLMES, Circuit Judge, concurring in the denial of rehearing en banc.

Judge Gorsuch in his dissent from denial of rehearing en banc contends that the panel opinion is overturning a state jury verdict, exacerbating a split in authority over recognition of a new constitutional right, and disregarding requests from the states in our circuit to hear the matter en banc.

The panel opinion simply remanded the matter to the district court to craft a remedy for a Sixth Amendment violation – here, ineffective assistance of counsel in advising Mr. Williams concerning a plea offer. *Williams v. Jones,* 571 F.3d 1086, 1094 (10th Cir.2009) (per curiam). On the eve of trial, Mr. Williams' counsel informed him of a plea offer that would result in a ten-year sentence. Counsel also told him that if he wanted to accept the deal, he must retain new counsel. Mr. Williams expressed his desire to accept the plea, but "felt pressured" by his attorney's threat to leave, his lack of money (his family already having paid counsel $30,000), and not knowing how he might quickly retain another lawyer.

Williams v. State, No. F-2000-1247, slip op. at 19, 24 (Okla.Crim.App. Feb. 18, 2003). In reviewing Mr. Williams' ineffective assistance of counsel claim, the OCCA "agree[d] wholeheartedly" with the state trial court's finding that counsel's "'action in advising his client that he would withdraw from his representation if he entered a guilty plea was highly improper.'" *Id.* at 20. "We find [counsel's] ultimatum to [Mr. Williams] concerning the guilty plea – that he would have to obtain new counsel if he desired to accept the ten year deal – amounted to deficient performance under *Strickland,*" *Id.* at 23. Next, the OCCA unanimously concluded that Mr. Williams "has indeed suffered prejudice by his trial counsel's action. . . ." *Id.* at 25.

A COA is jurisdictional and based on specific issues that meet the requirements of § 2253(c)(2). *Miller-El v. Cockrell,* 537 U.S. 322, 336-37, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). Contrary to the dissent's position, the prejudice question is beyond the scope of the COA because no one contests the state appellate court's finding of ineffective assistance of counsel during the plea process. Thus, the only issue encompassed within the COA is the adequacy of the remedy, not whether Mr. Williams established prejudice as part of his ineffective assistance claim. Much of the dissent's thesis, that ineffective assistance of counsel during the plea process cannot result in prejudice given a subsequent fair trial, simply is not within the grant of the COA.

Insofar as exacerbating a split in authority over a new constitutional right, this case involves neither a new constitutional right, nor a federal circuit split. The dissent's statement that "no decision from the United States Supreme Court has ever held (*or even hinted*) that a lawyer's bad advice to reject a plea offer gives rise to a violation of the Sixth Amendment" is as wrong as its statement that "there's no authority anywhere suggesting that Mr. Williams suffered a Sixth Amendment violation." Dissent from Denial of Reh'g En Banc at 1258, 1260 (emphasis added). In *Hill v. Lockhart,* the Supreme Court acknowledged that ineffective assistance of counsel could render a plea involuntary where a defendant who has accepted a plea offer can later establish that, but for counsel's erroneous advice, he would not have pled guilty and would have gone to trial. 474 U.S. 52, 56-59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). The holding of that case is unmistakable: "We hold, therefore, that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill,* 474 U.S. at 59, 106 S.Ct. 366.

This case merely presents the converse of *Hill*; the defendant contends that but for counsel's erroneous advice, he would have accepted the plea offer and foregone a trial. Not surprisingly, the federal circuits – including our own – have accepted such claims, as have Oklahoma state courts. *See United States v. Carter,* 130 F.3d 1432, 1442 (10th Cir.1997); *Williams,* 571 F.3d at 1086 n. 3 (listing cases from

nine other circuits); *Jiminez v. State,* 144 P.3d 903, 907 (Okla.Crim.App.2006).

The dissent's suggestion that the "OCCA's decision deserved more deference from us" is strange given that the dissent's approach is totally at odds with the OCCA's finding of prejudice in this case and in others presenting like circumstances. Rather than defer to the OCCA, the dissent would hold that the OCCA's finding of prejudice is contrary to federal law. *See Knowles v. Mirzayance,* ___ U.S. ___, 129 S.Ct. 1411, 1420, 173 L.Ed.2d 251 (2009) (suggesting that a state court's determination regarding ineffective assistance of counsel must be unreasonable in order for a federal court to grant relief). It is not surprising that the vast majority of courts considering this issue have not taken the dissent's path.[1] Consider a likely

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[1] As discussed in the panel opinion, no federal circuit, including the Seventh Circuit, follows the rule advanced by the dissent. *Williams,* 571 F.3d at 1093. Although the dissent contends that "the panel's decision is inarguably in conflict with the decisions of various state courts," Dissent from the Denial of Reh'g En Banc at 3 n. 3, at best three state cases have concluded that a subsequent fair trial remedies any prejudice in this situation. *See State v. Greuber,* 165 P.3d 1185 (Utah 2007); *Bryan v. State,* 134 S.W.3d 795 (Mo.Ct.App.2004); *State v. Monroe,* 757 So.2d 895, 898 (La.Ct.App.2000).

In *Greuber*, the court determined that a fair trial remedied any prejudice, but paired it with a finding that the defendant would not have accepted a guilty plea in any event. 165 P.3d at 1191. Moreover, the Utah court left an escape hatch: "We note that in these types of cases, the egregious conduct of counsel in misleading a defendant about the legal consequences of a decision to decline a plea offer or in failing to inform a defendant

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scenario where a defendant is not informed by counsel of a plea offer, proceeds to trial, and receives a much greater sentence. According to the dissent, the defendant has suffered no prejudice even if he can prove that had he been informed of the offer, he would have accepted it.

We merely hold in this case that, having found a federal constitutional violation, a court must fashion a remedy tailored to the injury. *United States v.*

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about the existence of such an offer might effectively constitute the *absence* of counsel at a critical stage." *Id.* at 1189 n. 4. Presumably, the complete denial of counsel during the plea stage could be prejudicial.

The Missouri court's holding is based upon the theory that the Sixth Amendment guarantee of effective assistance of counsel is implicated only when the deficient performance affects the reliability of the trial process. *Bryan,* 134 S.W.3d at 802 (citing *Lockhart v. Fretwell,* 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993)). This more restrictive view of ineffective assistance has been rejected by the Court. *Williams v. Taylor,* 529 U.S. 362, 393-95, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Moreover, in a subsequent case, the Missouri court seems to have retreated from this view, holding that misadvice about the maximum punishment which led to the rejection of a plea agreement would constitute prejudice. *McClendon v. State,* 247 S.W.3d 549, 555-56 (Mo.Ct.App.2007).

The Supreme Judicial Court of Massachusetts summed it up: "Although we have not had occasion to consider the issue, we agree with nearly every other appellate court that has, that if the offer is rejected because of the ineffective assistance of counsel, the fact that the defendant subsequently receives a fair trial does not ameliorate the constitutional harm that occurred in the plea consideration process." *Commonwealth v. Mahar,* 442 Mass. 11, 809 N.E.2d 989, 993 (2004) (collecting cases).

Morrison, 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981). The state court did not apply this principle, apparently constrained by state law sentencing options. On remand, the federal district court will exercise its discretion and apply an appropriate remedy after hearing from the parties.

Finally, while I appreciate the input of various state attorneys general in support of the rehearing petition, that alone cannot be the basis to rehear a case. Their position echoes the dissent's, urging that ineffective assistance of counsel claims cannot be based on rejected plea offers (even if accompanied by ineffective assistance of counsel) because the "defendant loses only a potential windfall." Amici Br. at 7. In my view, this is simply impossible to square with the Supreme Court's view of the effective assistance of counsel guaranteed to all.

GORSUCH, Circuit Judge, joined by TACHA, O'BRIEN, and TYMKOVICH, Circuit Judges, dissenting from the denial of rehearing en banc.

It's not every day we overturn a state jury verdict for first-degree murder when the defendant admits he received a fair trial and no one questions that his conviction is supported by overwhelming evidence. It's not every day we exacerbate a split of authority over the recognition of a new constitutional right, and do so despite warning signs from the Supreme Court against our course. And it's not every day we refuse to rehear a panel decision that every single state within

our jurisdiction has urged us to revisit. Today, we do all these things, and I respectfully dissent.[1]

Before his state trial, Michael Williams's lawyer persuaded him not to accept a plea offer that would have reduced the charge against him from first-degree murder to second-degree murder and given him a shot at a ten-year sentence. After rejecting the plea offer, Mr. Williams received a trial that he concedes was fair. At that trial, the government amassed overwhelming evidence of his guilt,[2] the jury

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[1] While voting for rehearing *en banc*, I have not sought panel rehearing. The matter before us is one of "exceptional public importance," meriting *en banc* review, 10th Cir. R. 35.1(A), and I surely believe the panel got it wrong. But, I cannot say, as I must to request panel rehearing, that my panel colleagues "overlooked or misconstrued" any argument or evidence presented to them. *See* 10th Cir. R. 40.1(A). In addition, because we have, sadly, lost a panel colleague to the academy, a vote among the remaining two panel members would likely result in a tie.

[2] In 1997, someone entered the home of Larry and Dolores Durrett with a gun. The gunman shot Mr. Durrett three times in his sleep, and twice more when the victim tried to pursue him. Mr. Durrett later died of his wounds. During a routine traffic stop the next day, police discovered Mr. Williams and his girlfriend, Debra Smith, with packed suitcases and a rifle matching the shell casings left at the Durretts's home. At trial, several witnesses reported hearing Mr. Williams threaten to kill Mr. Durrett over a botched drug deal. Evidence also revealed that Mr. Williams's friend and eventual co-defendant, Stacy Pearce, drove Mr. Williams to the Durretts's home the day of the murder and watched Mr. Williams exit the car with a gun in hand. Mr. Pearce testified that when Mr. Williams returned to the car he confessed to shooting Mr. Durrett. Ms. Smith also testified that Mr. Williams confessed to her that he killed Mr. Durrett.

unanimously reached a guilty verdict, and the trial court ultimately sentenced Mr. Williams to life in prison without the possibility of parole. After all this, Mr. Williams complained that his trial lawyer improperly convinced him to reject the government's pre-trial plea offer. The Oklahoma Court of Criminal Appeals (OCCA) agreed that Mr. Williams's lawyer had behaved "improper[ly]," OCCA Op. at 20 (internal quotation marks omitted), and reduced his sentence from life without the possibility of parole to life *with* the possibility of parole, the lowest sentence available under Oklahoma law for someone convicted of first-degree murder. While Mr. Williams sought the full benefit of the forgone plea, the OCCA recognized that a ten-year sentence was only possible in a second-degree murder case under state law, and that it had no power to compel the State's executive branch to revive that lesser charge.

Pursuing the matter further in federal court, Mr. Williams argued that the OCCA's decision violated the Sixth Amendment of the United States Constitution by failing to afford him more relief. The panel majority adopted the same view. So it is that, under the panel's holding, defendants in our circuit who are offered pre-trial plea agreements (and surely that's most of them) can now take a shot at trial knowing that, if it doesn't go well, they will still have a chance at reviving the forgone plea offer, as long as they can show counsel failed to advise them properly. And they may do all this even if the trial they elected proved to be fair, the evidence produced against them is

incontestable, and restoring the lost plea will require a federal court to compel a state prosecutor to revive a new and different set of charges than those endorsed by a grand jury, selected by the prosecutor for proof at trial, and found by the jury. Plainly, this holding represents a significant new federal intrusion into state judicial functions and a revamping of the separation of powers, one that unsurprisingly conflicts with the decisions of a number of other courts, including the Utah Supreme Court.[3] No doubt all

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[3] Mr. Williams very carefully argues that the panel's decision did not implicate a *federal* circuit split. Not only is this contention itself at least arguably incorrect, *see United States v. Springs*, 988 F.2d 746, 749 (7th Cir.1993), it also conspicuously bypasses the fact that the panel's decision is inarguably in conflict with the decisions of various state courts. *See Williams v. Jones*, 571 F.3d 1086, 1108 (2009) (Gorsuch, J., dissenting) (collecting authority); *see also Carmichael v. People*, 206 P.3d 800, 810-11 (Colo.2009) (Coats, J., dissenting). No doubt, this split in authority contributed to the Supreme Court's previous decision to grant certiorari to resolve the question. *See Hoffman v. Arave*, 455 F.3d 926, 942-43 (9th Cir.2006), *cert. granted*, ___ U.S. ___, 128 S.Ct. 532, 532-33, 169 L.Ed.2d 371 (2007), *vacated as moot*, 552 U.S. 117, 128 S.Ct. 749, 169 L.Ed.2d 580 (2008). Today's concurrence (but not Mr. Williams) seeks to downplay the panel's conflict with certain of these decisions. That is difficult to do. The Utah Supreme Court explicitly held, in contravention to the panel's holding, that "a fair trial for the defendant generally negates the possibility of prejudice." *State v. Greuber*, 165 P.3d 1185, 1190 (Utah 2007). While the court provided an alternative holding and (unremarkably) reserved for future review questions not presented to it (none of which is presented in our case), its primary holding unambiguously conflicts with the panel's. Similarly, the Missouri Court of Appeals plainly held that "effective assistance of counsel generally is not implicated unless counsel's challenged conduct had some effect on the reliability

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these factors contributed to the unusual decision of every state within our circuit (and some outside it) to join an *amicus* brief urging us to rehear this case *en banc*.

The OCCA's decision deserved more deference from us. In the provision of the Antiterrorism and Effective Death Penalty Act (AEDPA) that governs our review of cases like this one, Congress has instructed us to defer to state court decisions unless they are "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). As it happens, no decision from the United States Supreme Court has ever held (or even hinted) that a lawyer's bad advice to reject a plea offer gives rise to a violation of the Sixth Amendment, or any other provision of federal law. Neither does a conventional *Strickland* analysis compel such a novel result. And whether the OCCA chooses to engage in an elaborate Sixth Amendment exegesis is neither here nor there: we are not here to grade state court opinions but owe "deference to the state court's *result*, even if its reasoning is not expressly stated." *Aycox v. Lytle*, 196 F.3d 1174, 1177

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of the trial process." *Bryan v. State*, 134 S.W.3d 795, 802 (Mo.Ct.App.2004). Consistent with this rule, in *McClendon v. State*, 247 S.W.3d 549, 555-56 (Mo.Ct.App.2007), the Missouri court merely permitted an evidentiary hearing when an attorney "affirmatively misinformed" the defendant about the maximum punishment possible after (his constitutionally guaranteed) trial, a circumstance that the court took pains to emphasize was not presented in *Bryan*, and which likewise is not presented here.

(10th Cir.1999) (emphasis in original). Indeed, the Supreme Court has told us that a state court's decision "does not even require *awareness* of" *Strickland* or other Supreme Court cases to warrant deference under AEDPA, "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) (emphasis in original). That is hardly the case here, and as a result, we were statutorily obliged to leave the OCCA's decision undisturbed. *See Knowles v. Mirzayance*, ___ U.S. ___, 129 S.Ct. 1411, 1420, 173 L.Ed.2d 251 (2009) (explaining the "doubly deferential" review owed to state court decisions under *Strickland* and § 2254(d)(1)).

Even if we could somehow overlook the absence of any clearly established federal law suggesting that the OCCA's decision was improper and allow Mr. Williams, AEDPA notwithstanding, to argue for an extension of existing Sixth Amendment jurisprudence (that's really what he seeks), his project remains flawed on its own terms. The flaw resides in a conflation of *Strickland's* two analytically distinct elements. Even assuming that Mr. Williams's lawyer gave him bad advice in the pre-trial plea bargaining process, that alone is not enough to establish a Sixth Amendment violation. To make out a Sixth Amendment violation under *Strickland*, a lawyer's bad advice (or deficient performance) must also prejudice the defendant by infringing some legal *entitlement* due him. That is, a lawyer's bad advice must have some adverse impact on the defendant's legal rights – say, by

denying him his constitutionally guaranteed right to cross-examine a witness, or his constitutionally protected right to present exculpatory proof at trial. *See Strickland v. Washington,* 466 U.S. 668, 695, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Nix v. Whiteside,* 475 U.S. 157, 186-87, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986); *Terry Williams v. Taylor,* 529 U.S. 362, 393 n. 17, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Lockhart v. Fretwell,* 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). Underscoring all this, the Supreme Court has told us over and again that the Sixth Amendment right to effective assistance of counsel is not itself the font of substantive legal rights, but an instrumental right designed to ensure that the criminal defendant's lawyer sees to it that he receives all the protection to which other laws entitle him. *See United States v. Cronic,* 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *United States v. Gonzalez-Lopez,* 548 U.S. 140, 147, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).

Even now, on the State's motion for rehearing *en banc,* Mr. Williams still has not identified *any* legal entitlement due him that was denied him or infringed. This is so for the simple and disarming reason that a defendant has no legal entitlement to accept and enforce a pre-trial plea offer. In fact, the only potential source of law anyone has suggested that might entitle a defendant to accept a pre-trial plea bargain is the Due Process Clause of the United States Constitution. Yet, because the Bill of Rights "speaks in explicit terms to many aspects of criminal

procedure," the Supreme Court has set a high bar for us to pass before we may conscript the Due Process Clause into service on behalf of new and unenumerated constitutional rights. *Medina v. California*, 505 U.S. 437, 443, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) ("In the field of criminal law, we have defined the category of infractions that violate 'fundamental fairness' very narrowly based on the recognition that, beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." (internal quotation marks omitted)); *see also id.* at 445, 112 S.Ct. 2572 ("[P]reventing and dealing with crime is much more the business of the States than it is of the Federal Government. . . . [W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." (internal quotation marks omitted)). Under *Medina*, state criminal procedures and convictions will not be held to run afoul of the Due Process Clause unless they "offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 445, 112 S.Ct. 2572 (internal quotation marks omitted).

No principle of justice rooted in our constitutional order entitles a defendant to receive, accept, or enforce a plea offer. Very much to the contrary, the Supreme Court has explained (repeatedly) that a plea offer is a matter of executive grace – not constitutional right or even contract – and so affords the defendant no enforceable rights unless and until the plea is embodied in the judgment of a court. *See*

Weatherford v. Bursey, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977); *Mabry v. Johnson*, 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984), *abrogated on other grounds by Puckett v. United States*, ___ U.S. ___, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009); *Whiskey Cases*, 99 U.S. 594, 25 L.Ed. 399 (1878); *see also United States v. Norris*, 486 F.3d 1045, 1048, 1053 (8th Cir.2007) (en banc) (plurality).[4]

At the end of the day, there's no authority anywhere suggesting that Mr. Williams suffered a Sixth Amendment violation. It follows that the OCCA, in deciding to remit Mr. Williams's sentence from life without the possibility of parole to life with the possibility of parole, was *more generous to him than any federal law required*. But no good deed goes

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[4] Contrary to Mr. Williams's suggestion, *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), does not provide this right. *See Williams*, 571 F.3d at 1098 (Gorsuch, J., dissenting). In *Hill*, counsel performed deficiently when he convinced the defendant to *accept* a plea offer. *Id.* at 59, 106 S.Ct. 366. As a result, the defendant was denied his constitutional entitlement to a trial. The same simply cannot be said here. This isn't to suggest, however, that a district court may not take discretionary action (such as the exclusion of evidence) to prevent the government from gaining an unfair advantage from a defendant's reliance on a plea agreement that hasn't yet been reduced to a judgment of the court. *See Norris*, 486 F.3d at 1049.

unpunished.[5] Mr. Williams's arguments, adopted by the panel, mistake the deference due state court decisions under AEDPA, conflate two distinct portions of the *Strickland test*, and disregard fundamental principles of Due Process jurisprudence – leading us,

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[5] Mr. Williams's suggestion that my position is "at odds" with the OCCA's decision gets things backward. My position is that, under AEDPA, we should have deferred to the OCCA's decision. Of course, this is because I think the result the OCCA reached was more generous than any federal law required. But we often affirm for different reasons than those given by the court under review, and when we do so it is hardly reasonable to describe us as "at odds" with them. To the contrary, this is exactly what AEDPA requires of us: deference to state court decisions, whether perfect or not, so long as they are not contrary to clearly established federal law. Mr. Williams's related argument that the prejudice question is beyond the scope of the COA is likewise misguided. As the entire panel recognized, we had to ascertain what violation occurred, if any, in order to determine whether the OCCA adequately remedied the violation. Indeed, the panel *per curiam* followed precisely this course in its analysis. *See Williams*, 571 F.3d at 1090-92 ("In fashioning the appropriate remedy for ineffective assistance of counsel, the remedy should be tailored to the injury suffered from the constitutional violation. . . ." (internal quotation marks omitted)); *id.* at 1095 (Gorsuch, J., dissenting). In any event, the panel was of course free to expand the COA to reach the question as it did. *See Young v. Sirmons*, 551 F.3d 942, 974 n. 1 (10th Cir.2008); *see also Valerio v. Crawford*, 306 F.3d 742, 764 (9th Cir.2002) (en banc). And even if one assumed that the panel somehow wasn't entitled to reach the prejudice question, that would only make the case for review stronger – not weaker. There is, after all, no doubt that we can review and undo *ultra vires* holdings. Mr. Williams's proposal that we somehow couldn't review such a holding would perversely, and quite incorrectly, insulate from review decisions that are both erroneous *and* extra-jurisdictional. That's never been the law.

in the end, to intrude improperly into state criminal proceedings and charging decisions belonging to the executive, not judicial, department. For all these reasons, I respectfully submit, we should have reheard this case.